No. 99-5739-CFY Title: Dewey J. Jones, Petitioner
v.
United States

Docketed: August 13, 1999 Court: United States Court of Appeals for the Seventh Circuit

Entry	Date	Proceedings and Orders
	Aug 13 1999	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due October 13, 1999)
	Sep 9 1999	Order extending time to file response to petition until October 13, 1999.
	Oct 8 1999	Brief of respondent United States filed.
	Oct 19 1999	Reply brief of petitioner Dewey J. Jones filed.
	Nov 3 1999	Supplemental brief of petitioner Dewey J. Jones filed.
	Nov 8 1999	REDISTRIBUTED. November 12, 1999
	Nov 15 1999	Petition GRANTED. limited to the following question: Whether, in light of United States v. Lopez, 514 U.S. 549 (1995), and the interpretive rule that constitutionally doubtful constructions should be avoided, see DeBartolo Corp. v. Florida Gulf Coast Trades Council, 485 U.S. 568, 575 (1988), Section 844(i) applies to the arson of a private residence; and if so, whether its application to the private residence in the present case is constitutional. SET FOR ARGUMENT March 21, 2000. **********
	Dec 8 1999	Joint appendix filed.
	Dec 28 1999	Brief amicus curiae of Pacific Legal Foundation filed.
	Dec 29 1999	Brief amicus curiae of Center for the Original Intent of the Constitution, et al. filed.
	Dec 29 1999	Brief amicus curiae of Dale Lynn Ryan filed.
	Dec 30 1999	Brief of petitioner Dewey J. Jones filed.
	Dec 30 1999	LODGING consisting of twenty copies of an upublished article Nelson & Pushaw, Rethinking the Commerce Clause, submitted by counsel for the petitioner.
	Dec 30 1999	Brief amicus curiae of Cato Institute filed.
	Dec 30 1999	Brief amicus curiae of National Association of Criminal Defense Lawyers, et al. filed.
	Jan 13 2000	CIRCULATED.
	Jan 21 2000	Record filed.
	Jan 24 2000	Order extending time to file government's brief on the merits to and including February 7, 2000.
	Jan 27 2000	Record filed.
	Feb 7 2000	Brief of respondent United States filed.
	Mar 6 2000	Record filed.
	Mar 8 2000	Reply brief of petitioner Dewey J. Jones filed.
	Mar 15 2000	Record filed.

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99-5739

No.

ORIGINAL

SUPREME COURT, U.S.
AUG 13 1999
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

DEWEY J. JONES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

DONALD M. FALK
Counsel of Record
SHARON SWINGLE
Mayer, Brown & Platt
1909 K Street, N.W.
Washington, DC 20006
(202) 263-3000

Counsel for Petitioner

52 pp

99-5739
JONES
v
U.S.

QUESTION PRESENTED

Section 844(i), 18 U.S.C., prohibits the arson or attempted arson of property "used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce." In this case, the Seventh Circuit, in acknowledged conflict with decisions of the Ninth and Eleventh Circuits, held that the required nexus between the private residence burned in this case and interstate commerce was satisfied by connections the court recognized were insubstantial, including the receipt of natural gas, and the maintenance of a mortgage and homeowners' insurance on the property.

The question presented in this case is whether, in light of *United States* v. *Lopez*, 514 U.S. 549 (1995), Section 844(i) may be constitutionally applied to the arson of real property that is not actively used in any commercial activity and that lacks any substantial connection with interstate commerce.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT	1
REASONS FOR GRANTING THE PETITION	6
A. The Circuits Are Divided Over The Constitutionality Of Section 844(i) As Applied To Arson Of Property Not Actively Used In A Commercial Activity	8
B. The Seventh Circuit's Decision Expands The Scope Of Section 844(i) Beyond Constitutional Bounds	11
C. The Issue Presented Is Recurring And Of Great Practical Importance	21
CONCLUSION	26

TABLE OF AUTHORITIES

Page(s)

Cases

A.L.A. Schechter Poultry Corp. v. *United States*, 295 U.S. 495 (1935) 25

Bailey v. *United States*, 516 U.S. 137 (1995) 19, 20

Brecht v. *Abrahamson*, 507 U.S. 619 (1993) 11

Cohens v. *Virginia*, 19 U.S. (6 Wheat.) 264 (1821) 12

Engle v. *Isaac*, 456 U.S. 107 (1982) 11

Heart of Atlanta Motel, Inc. v. *United States*, 379 U.S. 241 (1964) 14

Hodel v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981) 14

Katzenbach v. *McClung*, 379 U.S. 294 (1964) 14

Maryland v. *Wirtz*, 392 U.S. 183 (1968) 13

Ramey v. *United States*, 514 U.S. 1103 (1995) 10-11

Russell v. *United States*, 471 U.S. 858 (1985) 18, 19, 20

United States v. *Corona*, 108 F.3d 565 (5th Cir. 1997) 8, 11, 16

United States v. *Denalli*, 73 F.3d 328 (11th Cir.), modified on other grounds, 90 F.3d 444 (1996) 6, 8, 9, 10

United States v. *Five Gambling Devices*, 346 U.S. 441 (1953) 20-21

United States v. *Flaherty*, 76 F.3d 967 (8th Cir. 1996) 5

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United States v. *Hickman*, 179 F.3d 230 (5th Cir. 1999) (en banc) 14, 15, 16, 17

United States v. *Hicks*, 106 F.3d 187 (7th Cir.), cert. denied, 117 S. Ct. 2425 (1997) 18

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United States v. *Lopez*, 514 U.S. 549 (1995) ..... *passim*

United States v. *McGuire*, 178 F.3d 203 (3d Cir. 1999) 16, 17, 19, 20

United States v. *Mennuti*, 639 F.2d 107 (2d Cir. 1981) 20

United States v. *Nguyen*, 117 F.3d 796 (5th Cir.), cert. denied, 118 S. Ct. 455 (1997) 16

United States v. *Pappadopoulos*, 64 F.3d 522 (9th Cir. 1995) ..... *passim*

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United States v. *Rea*, 169 F.3d 1111 (8th Cir. 1999) 5, 10

United States v. *Rodriguez-Moreno*, 119 S. Ct. 1239 (1999) 4

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United States v. *Tocco*, 135 F.3d 116 (2d Cir.), cert. denied, 118 S. Ct. 1581 (1998) .. 10

United States v. *Voss*, 787 F.2d 393 (8th Cir.), cert. denied, 479 U.S. 888 (1986) 10

United States v. *Wilson*, 133 F.3d 251 (4th Cir. 1997) 23

Wickard v. *Filburn*, 317 U.S. 111 (1942) 14

Constitutional Provisions, Statutes, and Regulation

U.S. CONST. art. I, § 8 ..... *passim*

15 U.S.C. § 1173(a)(1) 23

15 U.S.C. § 1245(a) 24

18 U.S.C. § 247 24

18 U.S.C. § 513 24

18 U.S.C. § 668 24

18 U.S.C. § 844(i) ..... *passim*

18 U.S.C. § 922(g)(1) 23

18 U.S.C. § 922(g)(8) 23

18 U.S.C. § 922(g)(9) 23

18 U.S.C. § 924(c) 3, 4

18 U.S.C. § 1365 24

18 U.S.C. § 1951(a) 23

18 U.S.C. § 1956 23

18 U.S.C. § 1962 24

18 U.S.C. § 2710 24

21 U.S.C. § 854(a) 24

26 U.S.C. § 5861(f) 3

28 U.S.C. § 1254(1) 1

33 U.S.C. § 1311 23

33 C.F.R. §328.3 23

Miscellaneous

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4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1769) 14

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PETITION FOR A WRIT OF CERTIORARI

Dewey J. Jones respectfully petitions this Court for a writ of certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit in this case .

OPINIONS BELOW

The opinion of the Seventh Circuit (App., *infra*, 1a-3a) is reported at 178 F.3d 479. The opinion of the district court (App., *infra*, 4a-8a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 17, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 8 of the United States Constitution provides in pertinent part:

> The Congress shall have Power * * * [t]o regulate Commerce with foreign Nations, and among the several states * * * .

Section 844(i), 18 U.S.C., provides in pertinent part:

> Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned * * * .

STATEMENT

Petitioner was convicted of a federal crime for setting fire to his cousin's private home, under a statute that federalizes arsons against property "used" in interstate commerce or "used * * * in an activity affecting" interstate commerce. That home was not used in any commercial activity, and the Seventh Circuit conceded that the links between the house and

interstate commerce — a mortgage, homeowners' insurance, and a natural gas hook-up — were insubstantial. Nonetheless, the court of appeals upheld the extension of federal criminal regulation to this non-commercial crime against inherently *intra*state property, grounding its decision on the economic significance of the entire residential real estate market, and of all arsons taken together. That truly sweeping view of federal government's ability to federalize local crimes conflicts with the views of two other courts of appeals.

1. On February 23, 1998, petitioner Dewey Jones visited the Fort Wayne, Indiana, residence of his cousin, James Walker. See 6/17/98 Tr. 35-36, 116-117. Jones earlier had telephoned the house in an unsuccessful effort to speak to Walker. *Id.* at 112-114. When Jones appeared at the Walker residence, he encountered Walker's wife, Lisa; Walker again was not home. *Id.* at 36, 116-117, 159. After telling Mrs. Walker, "I don't have nothing against you or your kids, this is between me and him [*i.e.*, Walker], but he is avoiding me," Jones threw a lit Molotov cocktail into the living room of Walker's residence, causing fire damage. *Id.* at 116-117. He escaped, briefly, in a Ford Explorer driven by another cousin, Jermaine Gist. *Id.* at 117, 147-150.

The arson originally was investigated by the Fort Wayne police and fire departments. 6/17/98 Tr. 33, 50. The fire department notified the federal Bureau of Alcohol, Tobacco, and Firearms, however, which then investigated the matter. *Id.* at 50. As a result of the latter investigation, on March 25, 1998, a federal grand jury returned a three-count indictment charging Jones with arson, 18 U.S.C. § 844(i), using a destructive device during and in relation to a crime of violence punishable as a federal offense (*i.e.*, the arson charged as a

violation of Section 844(i)), 18 U.S.C. § 924(c), and making an illegal destructive device, 26 U.S.C. § 5861(f).

At trial, there was no evidence that the Walkers conducted any business in their house. Instead, the government introduced three items of evidence to prove the jurisdictional element of Section 844(i). First, the mortgage on the Walker residence was held by an out-of-state company (Midland Mortgage of Oklahoma City, Oklahoma). See App., *infra*, 6a. A witness from the mortgage company testified, however, that the company suffered no loss as a result of the fire. See 6/17/98 Tr. 86. Second, natural gas was supplied to the Walker residence by the Northern Indiana Public Service Company, which received its gas from outside the state. See App., *infra*, 5a-6a. There was no evidence, however, that the supply of natural gas to the Walker residence was interrupted as a result of the fire. Cf. 6/17/99 Tr. 87-99. Third, the Walker residence was insured by a company with an out-of-state headquarters, which paid the Walkers' insurance claim with a draft from an out-of-state bank. App., *infra*, 6a. The insurer had about 20 employee agents in Fort Wayne, however, and the Walkers' insurance claim was settled by an employee claims adjuster who had authority to settle claims only in Fort Wayne. See 6/17/98 Tr. 75-80.

Before the case was submitted to the jury, Jones moved for acquittal on the Section 844(i) count, contending that the evidence was insufficient to show that the Walker property was used in interstate commerce or in any activity affecting interstate commerce. The district court denied the motion. 6/17/98 Tr. 163-165, 177-179.

2. The jury convicted Jones on all three counts, and the district court denied Jones' post-verdict motion for a judgment of acquittal on the Section 844(i) count and the count under 18 U.S.C. § 924(c).[1] App., *infra*, 4a-8a. The district court determined that, under Seventh Circuit precedent, the government was required to show only "a slight effect on interstate commerce" under Section 844(i). *Id.* at 8a (internal quotation marks omitted). Under that test, the district concluded, "the natural gas connection alone suffices to supply the interstate commerce element." *Id.* at 7a.

Jones was sentenced to 35 years in prison, over the objection of his victim, Walker, that the sentence was excessive and far higher than the sentence Jones would have received in state court. See 8/26/98 Tr. 18-19. The district court agreed that the sentence, which was mandated by statutory minima, was "probably * * * excessive." *Id.* at 21. Cf. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. CAL. L. REV. 643 (1997).

3. The Seventh Circuit affirmed the conviction. The court of appeals first addressed Jones's argument that, in light of this Court's decision in *United States* v. *Lopez*, 514 U.S. 549 (1995), the government was required to prove more than a "slight effect" on interstate commerce under Section 844(i). App., *infra*, 2a. The Seventh Circuit noted its disagreement with the Eighth Circuit's conclusion that *Lopez* was "irrelevant to prosecutions under

[1] The Section 924(c) count charged Jones with using and carrying a destructive device "during and in relation to a crime of violence for which [he] may be prosecuted in a court of the United States, arson in violation of 18 U.S.C. § 844(i)." See Indictment, Count Two (in unpaginated C.A. App.). An element of the Section 924(c) offense is an underlying crime of violence "for which the person may be prosecuted in a court of the United States." See *United States* v. *Rodriguez-Moreno*, 119 S. Ct. 1239, 1243 (1999). If the evidence is insufficient to support Jones' conviction under Section 844(i), it is insufficient to support the conviction under Section 924(c).

§ 844(i)." *Id.* at 2a (citing *United States* v. *Rea*, 169 F.3d 1111 (8th Cir. 1999), and *United States* v. *Flaherty*, 76 F.3d 967, 973-74 (8th Cir. 1996)). To the contrary, the Seventh Circuit held that, under *Lopez*, statutes enacted under the commerce power, such as Section 844(i), could reach only activities that "substantially affect commerce." *Ibid.*

The court of appeals then considered whether that standard had been met. The Seventh Circuit acknowledged that the interstate connections proven by the government — out-of-state natural gas, insurance, and mortgage — "are pretty slight for a single building" and "don't establish a 'substantial' connection between this arson (or this residence) and interstate commerce." App., *infra*, 2a. The court affirmed the conviction, however, finding that the statute was constitutionally applied for two reasons.

First, the Seventh Circuit observed that "the residential housing industry is interstate in character." App., *infra*, 2a. The court explained that "[g]oods and materials for housing move across state borders; gas and electricity likewise; the financial and insurance markets that provide loans and spread risks have national if not international scope; arson can substantially affect all of those." *Ibid.* The court of appeals concluded that this connection between interstate commerce and residential real estate *in toto* was sufficient to render application of Section 844(i) constitutional in this case. *Id.* at 2a-3a.

Second, taking a different approach, the Seventh Circuit pondered "whether 'arson of buildings' or even 'arson of residences' substantially affects commerce," and concluded that "the answer still must be yes." App, *infra*, 3a. The court considered the damage caused by all such arsons taken together, and found that "[i]f even a small fraction of the loss is covered

by interstate insurance markets, the effect is 'substantial.'" *Ibid.* Arsons of residential properties have additional consequences, the court noted: they "affect[] gas, electric, and telephone service, require[] the occupants to stay at hotels while repairs [a]re completed (a sure sign of interstate commerce * * *), [lead] friends and loved ones to travel from other states to give comfort to the victims, and so on." *Ibid.* These collective effects, the court concluded, in tandem with "proof of a slight connection between the particular arson and interstate commerce," were sufficient to permit application of Section 844(i). *Ibid.*

The Seventh Circuit acknowledged that its decision squarely conflicted with decisions of the Ninth and Eleventh Circuits that "have distinguished between commercial and residential property and held that the national government lacks the constitutional authority to punish arsons of residences." App., *infra*, 2a (citing *United States* v. *Pappadopoulos*, 64 F.3d 522 (9th Cir. 1995), and *United States* v. *Denalli*, 73 F.3d 328 (11th Cir.), modified on other grounds, 90 F.3d 444 (1996)).

REASONS FOR GRANTING THE PETITION

For more than four years the federal courts have grappled with the limits on federal power under the Commerce Clause that this Court articulated in *United States* v. *Lopez*, 514 U.S. 549 (1995). One area of particular confusion has been the application of the principles explained in *Lopez* to federal statutes that contain jurisdictional elements. The four justices who dissented in *Lopez* foresaw the "legal uncertainty" about the connection to interstate commerce required for application of Section 844(i) and similar statutes. See *id.* at 630. That

"uncertainty" has ripened into a square conflict among the circuits over the constitutional breadth of Section 844(i), and warrants immediate review by this Court.

As the Seventh Circuit acknowledged, the courts of appeals are deeply divided over whether, consistent with the limits of the commerce power, Section 844(i) may be applied to the arson of residential real property not actively used in business. As this case demonstrates, for some courts analysis under *Lopez* is an empty exercise that permits the Commerce Clause to be used to federalize any crime that, in the aggregate, has substantial costs to the nation. The court of appeals in this case also nullified the limiting effect of the jurisdictional element in the statute. If the constitutional limitations set forth in *Lopez* can be dodged so easily, there is no effective limit on the assertion of federal power. The decision below, and others like it, permit trivial and attenuated effects on interstate commerce to support federal authority over crimes that are fundamentally intrastate — in this case, a crime committed against real property that was not used in business.

The many federal appellate decisions addressing the jurisdictional element of Section 844(i) confirm the exceptional importance of this issue. Moreover, as the Seventh Circuit also noted, in 1997 there were more than 33,000 arsons of buildings, including nearly 14,000 arsons of single-family homes — each one a federal crime according to the decision below. The reasoning of the decision below would appear to authorize a general federal police power over almost any crime affecting property. This Court should grant review to foreclose further circumvention of the limiting principles recognized in *Lopez*.

A. The Circuits Are Divided Over The Constitutionality Of Section 844(i) As Applied To Arson Of Property Not Actively Used In A Commercial Activity

The courts of appeals are sharply divided over whether the Commerce Clause permits application of Section 844(i) to the arson of residential property that is not actively used in a commercial activity. The Seventh Circuit explicitly acknowledged that its decision conflicts with decisions of two other courts of appeals. App., *infra*, 2a (citing *United States* v. *Pappadopoulos*, 64 F.3d 522 (9th Cir. 1995), and *United States* v. *Denalli*, 73 F.3d 328 (11th Cir.), modified on other grounds, 90 F.3d 444 (1996)).

In *Pappadopoulos*, the Ninth Circuit squarely held that the Commerce Clause bars application of Section 844(i) to arson of residential property that is not actively used in some commercial enterprise. By contrast with the Seventh Circuit in this case, the Ninth Circuit held that the government must prove that the wrongful conduct in an individual case had "a 'substantial' effect on or connection to interstate commerce" in order to sustain a conviction under Section 844(i). 64 F.3d at 527. The Ninth Circuit concluded that "the receipt of natural gas * * * from out-of-state sources" was insufficient to show the necessary substantial effect on commerce. *Ibid.*[2] As Chief Judge Wallace explained, "[i]f the Commerce Clause were extended to reach the activity that the government seeks to punish here, we would be 'hard-pressed to posit any activity by an individual that Congress is without power to regulate.'" *Ibid.* (quoting *Lopez*, 514 U.S. at 564).

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[2] See also *United States* v. *Corona*, 108 F.3d 565, 570-571 (5th Cir. 1997) (Higginbotham, J.) ("[W]e doubt that an effect as small as the cessation of natural gas service to a single household" is sufficient under the Commerce Clause to support applying Section 844(i) to arson of the house) (dictum).

The Eleventh Circuit also has rejected application of Section 844(i) to arson of a private residence that was not used in a business. See *United States* v. *Denalli*, 73 F.3d 328 (11th Cir.), modified on other grounds, 90 F.3d 444 (1996). Relying on *Pappadopoulos*, the Eleventh Circuit held that "*Lopez* required the government to prove that the destruction of [the particular residence] had a substantial effect on interstate commerce" in order to satisfy the interstate commerce element of Section 844(i). *Id.* at 330. In *Denalli*, the Eleventh Circuit rejected the government's effort to establish a nexus with interstate commerce by proving that the owner of the residence, an engineer for a company engaged in interstate commerce, occasionally used his home computer for work purposes. *Id.* at 329-331.

By contrast, the Fourth Circuit has agreed with the Seventh Circuit that Section 844(i) may be constitutionally applied to arson of property that is not actively used in any commercial activity. See *United States* v. *Ramey*, 24 F.3d 602 (4th Cir. 1994), cert. denied, 514 U.S. 1103 (1995). The Fourth Circuit held that Section 844(i) could encompass the fire-bombing of a trailer home because the trailer received electricity from an interstate power grid. *Id.* at 607. Although the decision in *Ramey* preceded this Court's decision in *Lopez*, the Fourth Circuit has relied upon *Ramey* in summarily dismissing constitutional challenges to the application of Section 844(i) after *Lopez*. See, *e.g.*, *United States* v. *Hall*, 129 F.3d 1261 (table), 1997 WL 712885, at *2 (4th Cir. Nov. 17, 1997), cert. denied, 118 S. Ct. 2331 (1998); *United States* v. *Hinds*, 125 F.3d 849 (table), 1997 WL 636810, at *1 (4th Cir. Oct. 15, 1997), cert. denied, 118 S. Ct. 1100 (1998).

As the Seventh Circuit noted in the decision below (App., *infra,* 2a), the Eighth Circuit has held that *Lopez* does not affect the analysis of the constitutional application of Section 844(i) because that statute has an explicit jurisdictional element; thus, in that court's view, a *de minimis* connection with commerce is sufficient. *United States* v. *Rea*, 169 F.3d 1111, 1113 (8th Cir. 1999).[3] The Second Circuit agrees. See *United States* v. *Tocco*, 135 F.3d 116, 123-124 (2d Cir.), cert. denied, 118 S. Ct. 1581 (1998). By contrast, at least three other circuits agree with the decision below and have applied some version of the "substantial effect" analysis mandated by *Lopez* to Section 844(i). See *Pappadopoulos*, 64 F.3d at 526; *Denalli*, 73 F.3d at 330; *United States* v. *Latouf*, 132 F.3d 320, 325-327 (6th Cir.), cert. denied, 118 S. Ct. 1542 (1998). By reviewing the present case this Court could resolve this additional conflict among the circuits on the applicability of the *Lopez* analysis to Section 844(i) and other federal criminal statutes that contain jurisdictional elements.

In sum, the courts of appeals are deeply divided over whether application of Section 844(i) to the arson of a private residence not being actively used in commerce extends the statute beyond constitutional bounds. The conflict in the circuits is not surprising; as five Justices of this Court have recognized, the *Lopez* decision raises serious questions about the permissible scope of Section 844(i). See *Lopez*, 514 U.S. at 630 (Breyer, J., dissenting, joined by Stevens, Souter, and Ginsburg, JJ.); *Ramey* v. *United States*, 514 U.S. 1103 (1995)

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[3] Significantly, however, the Eighth Circuit recognized that insurance coverage from an interstate insurer could not by itself establish even a *de minimis* basis under the Commerce Clause for the application of Section 844(i) to a residence. See *Rea*, 169 F.3d at 1113 (citing *United States* v. *Voss*, 787 F.2d 393, 397 (8th Cir.), cert. denied, 479 U.S. 888 (1986)).

(Scalia, J., dissenting from denial of certiorari in *Ramey*, *supra*). See also *United States* v. *Corona*, 108 F.3d 565 (5th Cir. 1997) ("*Lopez* calls into question a family of cases interpreting § 844(i)."). This Court should grant review to resolve this fully ripened conflict.

B. The Seventh Circuit's Decision Expands The Scope Of Section 844(i) Beyond Constitutional Bounds

Further review is warranted for the additional reason that the Seventh Circuit's decision expands the reach of Section 844(i) beyond what the Commerce Clause permits. The court of appeals fundamentally misinterpreted this Court's decision in *Lopez*, and created a loophole in Commerce Clause analysis that would permit the federal government to exercise virtually plenary police power over any intrastate property crime — or, for that matter, over almost any conduct affecting any building. Contrary to the Seventh Circuit's suggestion, the limitations of the commerce power require closer scrutiny of the connections between interstate commerce and any activity that Congress endeavors to make into a federal crime. Moreover, the jurisdictional element in Section 844(i) itself must receive an interpretation that accords both with its text and with the principles set forth in *Lopez*.

1. This Court has repeatedly recognized that, "[u]nder our federal system, the 'States possess primary authority for defining and enforcing the criminal law.'" *Lopez*, 514 U.S. at 561 n.3 (quoting *Brecht* v. *Abrahamson*, 507 U.S. 619, 635 (1993), and *Engle* v. *Isaac*, 456 U.S. 107, 128 (1982)). Although the States can legislate in any field, the "Constitution * * * withhold[s] from Congress a plenary police power." *Id.* at 566. Thus, federal legislation — especially federal criminal legislation, which trenches on an area "where States historically have been sovereign" (*id.* at 564) — must be firmly rooted in one of the "few and defined"

powers enumerated in the Constitution. *Id.* at 552 (quoting THE FEDERALIST No. 45, at 292-293 (C. Rossiter ed. 1961)).

From the earliest days of the Republic, it has been "clear[] that Congress cannot punish felonies generally." *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 428 (1821). The Commerce Clause empowers Congress to regulate interstate and foreign commerce, and that regulation may include criminal proscriptions and penalties. But the commerce power, although broad within its defined sphere, "is subject to outer limits." *Lopez*, 514 U.S. at 557. In *Lopez*, this Court "identified three broad categories of activity that Congress may regulate under its commerce power": (1) "the use of the channels of interstate commerce"; (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce"; and (3) "activities that ***substantially affect*** interstate commerce." *Id.* at 558-559 (emphasis added).

The Seventh Circuit recognized (App., *infra*, 2a) that application of Section 844(i) in this case can be justified, if at all, only as a regulation of an activity that "substantially affect[s]" interstate commerce. The court of appeals also acknowledged that the interstate connections proved at Jones's trial "don't establish a 'substantial' connection between this arson (or this residence) and interstate commerce." *Ibid.* The Seventh Circuit concluded, however, that Section 844(i) could be applied even to arsons that had "pretty slight" (*ibid.*) — indeed, trivial — effects on interstate commerce. The court of appeals believed that it could disregard the insubstantiality of the particular arson's connections with interstate commerce because the "residential housing industry is interstate in character" and because

the "collective effect" on interstate commerce of "arson of buildings" or "arson of residences" is substantial. See *id.* at 3a.

But the commerce power does not authorize this kind of bootstrapping by aggregation when the starting point — the activity regulated — is not commercial at all. To the contrary, "the *de minimis* character of individual instances arising under [a statute enacted under the commerce power] is of no consequence" ***only*** "where *a general regulatory statute bears a substantial relation to commerce*." *Lopez*, 514 U.S. at 558 (quoting *Maryland* v. *Wirtz*, 392 U.S. 183, 197 n.27 (1968)). Section 844(i), however, is not "an essential part of" any such "larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity" — *i.e.*, arson — were regulated. *Id.* at 561.

The Seventh Circuit held that Section 844(i) could pass constitutional muster in part because, in that court's view, "the residential housing industry is interstate in character." App., *infra*, 2a. But that has nothing to do with the constitutionality of Section 844(i), which is not part of a scheme to regulate the "residential housing industry." If an arson prohibition may be justified by the "interstate * * * character" of the "residential housing industry," so could nationwide zoning regulations (limited, perhaps, to structures that received utilities from interstate systems). That cannot be possible under the Commerce Clause.

The commerce power does authorize "regulation[] of [intrastate] activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce." *Lopez*, 514 U.S. at 561. But the effects of arson cannot be aggregated for purposes of constitutional analysis for a simple reason. Arson

cannot characterized as an activity that "arise[s] out of or [is] connected with a commercial transaction" (*ibid.*) that, although intrastate, has a discernible and definable connection with an interstate market or other interstate commercial process.

Simple arson "has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." *Ibid.* See *Pappadopoulos*, 64 F.3d at 526 (arson of a private residence "is not commercial or economic in nature"). Burning a building does not involve any economic transaction or exchange. See *Lopez*, 514 U.S. at 559, 561. Cf. *Katzenbach* v. *McClung*, 379 U.S. 294 (1964); *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241 (1964). Arson also does not involve the manufacture or production of an economically valuable commodity. See *Lopez*, 514 U.S. at 559-560. Cf. *Wickard* v. *Filburn*, 317 U.S. 111 (1942); *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981). And because one arson generally bears no economic relation to another, Section 844(i) not only "is not a regulation of any relevant economic market," but there are no "other rational connections among nationwide [arsons] that would entitle Congress to make federal crimes of them all." *United States* v. *Hickman*, 179 F.3d 230, 231 (5th Cir. 1999) (en banc affirmance by an equally divided court) (Higginbotham, J., dissenting).

To the contrary, arson falls within the heartland of traditional "criminal law enforcement," an area in which "States have historically been sovereign."[4] *Lopez*, 514 U.S. at 564.

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[4] Arson has been recognized as a common law crime since before the Norman Invasion, see 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 222 (1769), and has been criminalized by the States "[f]rom the earliest colonial days." Panneton, *Federalizing Fires: The Evolving Federal Response to Arson Related Crimes*, 23 AM. CRIM. L. REV. 151, 151 (1985). See generally Poulos, *The Metamorphosis of the Law of Arson*, 51 MO. L. REV. 295 (1986).

Arson surely is "an activity beyond the realm of commerce in the ordinary and usual sense of that term." *Id.* at 583 (Kennedy, J., concurring). If arson is a "commercial" activity, it is difficult to imagine any property crime that is not.

The Seventh Circuit's reliance (App., *infra*, 3a) on the nationwide cost of "arson of buildings" or "arson of residences" as a means of conjuring up a substantial aggregate effect on interstate commerce is another form of the generalized "'costs of crime' reasoning" that this Court rejected in *Lopez*. 514 U.S. at 564. Relying solely on the aggregated costs of crime — or a type of crime — to render the application of a federal criminal statute constitutional under the Commerce Clause would "convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *Id.* at 567. Many varieties of local crimes, when aggregated, have significant economic effects; that is precisely *why* the effects on interstate commerce of garden-variety, independent criminal acts of one kind or another can *not* be aggregated to prop up a federal criminal statute. See *Hickman*, 179 F.3d at 233 (Higginbotham, J., dissenting) ("individual acts cannot be aggregated if their effects on commerce are causally independent of one another"). Promiscuous use of aggregation analysis in such circumstances would permit federal regulation of "truly local" matters. *Lopez*, 514 U.S. at 568.

2. This Court has explained how Congress can use the commerce power to regulate activity, such as arson, that lacks a substantial, interdependent effect on interstate commerce across the board. When the effects of an activity on interstate commerce cannot properly be aggregated for the purpose of Commerce Clause analysis, Congress may alleviate potential

constitutional problems in a statute by "limit[ing] its reach to a discrete set of [activities] that additionally have an explicit connection with or effect on interstate commerce." *Lopez*, 514 U.S. at 561.

This Court did not suggest that the mere inclusion of a jurisdictional element in a statute would permit Congress to regulate outside the three categories of activity within the scope of the Commerce Clause. Thus, "[a] jurisdictional element by itself cannot save a statute that exceeds congressional authority." *Hickman*, 179 F.3d at 240 (Higginbotham, J., dissenting). Rather, the Court assumed that the jurisdictional element "would ensure, ***through case-by-case inquiry***," that particular instances of the regulated activity ***did*** fall within Congress's commerce power. See *Lopez*, 514 U.S. at 561-562 (emphasis added). That is, where channels or instrumentalities of commerce are not at issue, the construction and application of the jurisdictional element should ensure that the activity regulated in fact "substantially affects" interstate commerce. See *id.* at 559.

As Chief Judge Wallace has explained, this case-by-case inquiry must be applied to Section 844(i), and thus "the government must satisfy the jurisdictional requirement by pointing to a 'substantial' effect on or connection to interstate commerce" in the "individual case[]." *Pappadopoulos*, 64 F.3d at 527.[5] To serve the proper screening function, "[t]he

[5] See also *United States* v. *Corona*, 108 F.3d 565, 569-571 (5th Cir. 1997) (Higginbotham, J.) (finding that particular arson of taxicab warehouse had substantial effect); *United States* v. *Nguyen*, 117 F.3d 796, 799 (5th Cir.) (Edith Jones, J., dissenting) (advocating analysis of actual or intended effect of arson on commercial activity conducted at target property), cert. denied, 118 S. Ct. 455 (1997) . Cf. *United States* v. *McGuire*, 178 F.3d 203, 209, 212 n.10 (3d Cir. 1999) (*Lopez* requires case-by-case jurisdictional analysis under Section 844(i), but not necessarily proof "that a particular use has a 'substantial' effect on interstate commerce").

jurisdictional element must in some way be meaningful." *Hickman*, 179 F.3d at 240 (Higginbotham, J., dissenting). The "substantial effect" perhaps need not be *quantitatively* large in every case so long as *qualitatively* the effect is closely connected to commerce and to the proscribed or regulated activity. But transparently insubstantial connections with commerce — such as the passive receipt of utility service, or the existence of a mortgage or insurance — will not do.

The Seventh Circuit nonetheless concluded that such concededly "slight" links between the burned property and commerce — trivial links, under any reasoned analysis — sufficed to bring Jones' arson within the constitutional scope of the statute. App., *infra*, 3a. If a *slight* connection is enough, however, then Congress could regulate not only every arson, but every (or nearly every) property crime of any kind. The same rationale would permit plenary federal power in other areas. After all, almost every act in modern life has at least a "slight connection" (*ibid.*) to interstate commerce:

> [D]riving a few blocks to pick up one's children (consumption of gasoline refined from foreign oil, and wear and tear on vehicle manufactured in another state or country) or eating dinner in front of one's own television set (consuming food and beverages from outside of state or country, as well as decisions on how to spend hundreds of millions of advertising dollars), have an indirect effect on interstate, and often foreign commerce.

United States v. *McGuire*, 178 F.3d 203, 210 (3d Cir. 1999).

The Seventh Circuit's *de minimis* approach — which to a significant extent is a pre-*Lopez* Commerce Clause analysis in which *any* effect, substantial or not, suffices to confer federal jurisdiction — nullifies the winnowing function that a jurisdictional element must serve to render an application of a statute constitutional. As interpreted by the Seventh

Circuit, the jurisdictional element of Section 844(i) simply does not "limit" Section 844(i)'s "reach to a discrete set" of arsons "that additionally have an explicit connection with or effect on interstate commerce." *Lopez*, 514 U.S. at 562.

3. In seeking out attenuated connections to interstate commerce that might justify applying Section 844(i) in this case, the Seventh Circuit also disregarded — or, what is the same thing, interpreted into nullity — the specific connections to interstate commerce that Congress identified as necessary in any particular prosecution under the statute. The Seventh Circuit equated the "proof of a small effect" on commerce that, it believed, would "satisfy the statute" (App., *infra*, 2a) with the "proof of a slight connection between the particular arson and interstate commerce" that, in the court's view, would "permit[] the national government to establish substantive rules of conduct" (*id.* at 3a). In doing so, the Seventh Circuit followed established circuit precedent equating the analysis of the jurisdictional element of the statute with analysis under the Commerce Clause. See, *e.g.*, *United States* v. *Hicks*, 106 F.3d 187, 190 (7th Cir.), cert. denied, 117 S. Ct. 2425 (1997); *United States* v. *Stillwell*, 900 F.2d 1104, 1109-1110 (7th Cir.), cert. denied, 498 U.S. 838 (1990).

That reasoning misuses the statement in *Russell* v. *United States* that "[t]he legislative history indicates that Congress intended to exercise its full power to protect 'business property.'" 471 U.S. 858, 860 (1985). For some courts of appeals, this Court's observation has become a basis for extending Section 844(i) to arsons of property that a court decides have *any* tenuous connection with interstate commerce that might render application of the statute constitutional under a *de minimis* test. See, *e.g.*, *Hicks*, 106 F.3d at 190.

But as this Court pointed out in *Russell*, whatever the scope of Congress's power to enact anti-arson legislation, "[b]y its terms, * * * the statute only applies to property that is 'used' in an 'activity' that affects commerce." 471 U.S. at 862. Congress thus narrowed the field of connections with interstate commerce that may make the application of *this* statute constitutional (or may fail to do so). Courts can no more use constitutional theory to broaden a statute beyond its text than they can permit a statute to exceed the limits of congressional power. Congress exercises the commerce power only through legislation, not through legislative history and certainly not through judicial decisions.

Whether the required connection between a specific arson and interstate commerce must itself be "substantial," or instead may meet some lesser but non-trivial standard, cf. *McGuire*, 178 F.3d at 211 n.7, 212 n.10, the effect on commerce must be discernible from the building's "use" in an "activity affecting" interstate commerce. The ordinary or natural meaning of "use" is "active employment." See *Bailey* v. *United States*, 516 U.S. 137, 143, 145 (1995). There is no indication in the text or legislative history of Section 844(i) that Congress intended "use" in Section 844(i) to mean anything else. To the contrary, both the text and history of the statute suggests that Congress intended to invoke the commerce power to protect property — primarily business property — actively used in a commercial activity or to perform a commercial function.[6]

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[6] See *Russell*, 471 U.S. at 860-862; *United States* v. *Ryan*, 41 F.3d 361, 369-370 (8th Cir. 1994) (en banc) (Richard Arnold, C.J., concurring in part and dissenting in part), cert. denied, 514 U.S. 1082 (1995); Note, *The Jurisdictional Element of 18 U.S.C. § 844(i), A Federal Criminal Clause Statute*, 48 WASH. U. J. URB. & CONTEMP. L. 183, 209 (1995) (Section 844(i)'s reference to "use" "limits the statute's broad 'affecting interstate commerce' language" and requires an inquiry into the "property's function"). The legislative

The Seventh Circuit's conclusion that Jones committed arson of a property "used" in an activity affecting interstate commerce cannot be reconciled with the plain meaning of the statute. Under any reasonable interpretation of the term "use," the owner of a residence does not "use" the structure when she receives natural gas, or secures or pays for a mortgage or homeowners' insurance. To "use" a structure in an activity affecting commerce implies some "action and implementation" involving the structure in commercial activity, *Bailey*, 516 U.S. at 145, not the passive immersion in a modern economy that is all the Seventh Circuit could rely on here. As Judge Friendly long ago explained for the Second Circuit, to interpret Section 844(i) to reach a private residence based on such matters would effectively read the word "used" out of the statute. See *United States* v. *Mennuti*, 639 F.2d 107, 110 (2d Cir. 1981).

It would make no sense to "require[] Congress to include a jurisdictional element" if courts were free to "interpret the resulting statutes in such a way as to remove it." *McGuire*, 178 F.3d at 212. But that is what the Seventh Circuit did here. Under no meaningful analysis could the slight, concededly insubstantial interstate connections proved in this case support an application of Section 844(i) that would be consistent with the limits on the commerce power or with the terms of the statute. Far from "construe[ing] a statute in a manner that requires decision of serious constitutional questions only if the statutory language leaves no reasonable alternative," *Lopez*, 514 U.S. at 562 (quoting *United States* v. *Five Gambling*

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history indicates that Congress did intend that Section 844(i) apply to police stations, churches, and synagogues. *Russell*, 471 U.S. at 862 n.6. Congress unquestionably was concerned with the public use of these buildings, although it might be debated whether those uses in every case encompass an activity that substantially affects interstate commerce.

Devices, 346 U.S. 441, 448 (1953) (plurality opinion)), the Seventh Circuit deprived the jurisdictional element of meaning in a way that makes resolution of the underlying constitutional question necessary.

By eviscerating the explicit jurisdictional element in the statute, the Seventh Circuit prevented that element from performing its constitutional function — to "limit [the] reach" of Section 844(i) "to a discrete set of [activities] that additionally have an explicit connection with or effect on interstate commerce." *Lopez*, 514 U.S. at 562. That aspect of the Seventh Circuit's decision, like the other aspects discussed above, obliterates the "distinction between what is truly national and what is truly local." 514 U.S. at 567-568. The decision therefore warrants further review by this Court.

C. The Issue Presented Is Recurring And Of Great Practical Importance

The conflict among the circuits over Section 844(i)'s constitutional reach is of great practical and doctrinal significance. Section 844(i) itself is an important part of the burgeoning federal criminal code, and is the subject of frequent litigation in the federal courts. In addition, many other federal criminal statutes contain similar jurisdictional elements. A decision in this case would provide guidance to the lower courts that, after *Lopez*, must interpret jurisdictional elements like those in Section 844(i) to provide their critical and constitutionally compelled limiting function. That is particularly important as federal criminal legislation increasingly encroaches on the prerogatives of the States. Resolving the issue that has divided the courts of appeals would give the Court the opportunity to provide uniformity in this aspect of the "sensitive relation between federal

and state criminal jurisdiction." *Lopez*, 514 U.S. at 561 n.3 (internal quotation marks omitted).

1. As the depth of the conflict among the circuits demonstrates, the federal courts frequently must define the constitutional scope of Section 844(i). The recurrence of the issue is not surprising. In 1997 alone, the FBI reported that there were 13,692 arsons of single-family residential properties nationwide in 1997. See App., *infra*, 3a. Nationwide home-ownership patterns suggest that approximately two-thirds of these residences were privately owned. See U.S. Census Bureau, *Housing Vacancy Survey*, <http:// www.census.gov/hhes/ www/housing/hvs/q299tab5.html>. If not resolved here, the question presented in this petition will recur regularly in the federal courts, with the outcome in each case depending on the location of the courthouse.

2. The constitutional scope of Section 844(i) in light of *Lopez* not only is an exceptionally frequent subject of litigation, but the issue has drawn considerable scholarly attention.[7] By and large, these commentators recognize what the conflict among the circuits

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[7] See, *e.g.*, Adler, *Wetlands, Waterfowl, and the Menace of Mr. Wilson: Commerce Clause Jurisprudence and the Limits of Federal Wetland Regulation*, 29 Envtl. L. 1, 18 (1999); Funk, *The Lopez Report*, ADMIN. & REG. L. NEWS, Summer 1998, at 1, 14-15; Leasure, *Commerce Clause Challenges Spawned by* United States *v.* Lopez *Are Doing Violence to the Violence Against Women Act (VAWA): A Survey of Cases and the Ongoing Debate Over How the VAWA Will Fare in the Wake of* Lopez, 50 ME. L. REV. 410, 412-413 & n. 22 (1998); Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. CAL. L. REV. 643, 665-667 (1997); Ellis, Casenote, *A* Lopez *Legacy?: The Federalism Debate Renewed, But Not Resolved*, 17 N. ILL. U. L. REV. 85, 85-86, 108-114 (1996); Schwartz, *Term Limits, Commerce, and the Rehnquist Court*, 31 TULSA L. J. 521, 527-528 (1996); Lupkes, *Constitutional Law — Federal Commerce Power: Striking Down the Gun Free School Zones Act As Beyond Congressional Power:* United States *v.* Lopez, *115 S. Ct. 1624 (1995)*, 72 N.D. L. REV. 1081, 1097 (1996); Jurich, Comment, United States *v.* Lopez: *The Supreme Court Takes a Shot at Congressional Authority Under the Commerce Clause*, 19

makes crystal clear: that the decision in *Lopez* created substantial confusion about the permissible scope of Section 844(i), and that "judicial upheaval" has resulted. Kolenc, *Commercial Clause Challenges After* United States *v.* Lopez, 50 FLA. L. REV. 867, 884 (1998).

3. In addition, the issue of the constitutional reach of Section 844(i) has broad-ranging implications for the numerous federal statutes that contain identical or similar jurisdictional elements. Federal firearms statutes, for example, prohibit the possession "in or affecting commerce" of firearms or ammunition. See 18 U.S.C. § 922(g)(1), (8), (9). The Hobbs Act prohibits the use of robbery or extortion to "obstruct[], delay[], or affect[] commerce." 18 U.S.C. § 1951(a). The federal money-laundering statute criminalizes financial transactions involving knowing use of unlawfully obtained funds if the transaction "in any way or degree affects interstate or foreign commerce." 18 U.S.C. § 1956. In addition, regulations implementing the Clean Water Act construe that statute to prohibit the discharge of pollutants into all waters "the use, degradation or destruction of which could affect interstate or foreign commerce." 33 C.F.R. § 328.3 (construing 33 U.S.C. § 1311).[8] Resolution of the question could affect the application of these statutes, and many, many others.[9]

HAMLINE L. REV. 229, 266 n.304 (1995).

[8] Indeed, the Fourth Circuit has struck down this regulation, noting that it "would appear to exceed congressional authority under the Commerce Clause." *United States* v. *Wilson*, 133 F.3d 251, 257 (4th Cir. 1997).

[9] See, *e.g.*, 15 U.S.C. § 1173(a)(1) (requiring registration of "any person engaged in the business of manufacturing gambling devices, if the activities of such business in any way

4. Finally, the question presented in this case is exceptionally important because the federalization of criminal law is accelerating not merely through new statutes, but through "remarkably expansive" applications of the jurisdictional elements in the statutes that exist. Frickey, *The Fool on the Hill: Congressional Findings, Constitutional Adjudication, and* United States *v.* Lopez, 46 CASE W. RES. L. REV. 695, 701 (1996). "Since the 1970s, Congress has vastly increased the federal government's jurisdiction over crime," largely by "criminaliz[ing] a variety of activities traditionally considered to be purely state matters." Hollon, *After the Federalization Binge: A Civil Liberties Hangover*, 31 HARV. C.R.-C.L. L. REV. 499, 499 (1996). See AMERICAN BAR ASS'N, TASK FORCE ON THE FEDERALIZATION OF CRIMINAL LAW, THE FEDERALIZATION OF CRIMINAL LAW 7-12 (1998).

Congress continues to press against constitutional boundaries in its lawmaking in this area, a matter of some considerable concern to the judiciary as the criminal caseload of the

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affect interstate or foreign commerce"); 15 U.S.C. § 1245(a) (banning possession, manufacture, sale, or importation "in or affecting interstate commerce" of ballistic knife); 18 U.S.C. § 247 (barring damage of religious real property or intentional obstruction of free exercise of religious beliefs if the offense "is in or affects interstate * * * commerce"); 18 U.S.C. § 513 (prohibiting possession, creation, or transfer of counterfeited security of an entity "which operates in or the activities of which affect interstate * * * commerce"); 18 U.S.C. § 668 (criminalizing theft of certain property from "an organized and permanent institution, the activities of which affect interstate * * * commerce"); 18 U.S.C. § 1028 (criminalizing possession, production, or transfer of false identification document which "is in or affects interstate * * * commerce"); 18 U.S.C. § 1365 (criminalizing tampering with "any consumer product that affects interstate * * * commerce"); 18 U.S.C. § 1962 (prohibiting the use of income derived from a pattern of racketeering or collection of an unlawful debt for investment in an enterprise "the activities of which affect [] interstate * * * commerce"); 18 U.S.C. § 2710 (barring wrongful disclosure of rental or sale records by any person "engaged in the business [or renting or selling videotapes], in or affecting interstate * * * commerce"); 21 U.S.C. § 854 (a) (barring investment of drug profits in any enterprise "the activities of which affect interstate * * * commerce").

federal courts has more than doubled since 1980. Mengler, *The Sad Refrain of Tough on Crime: Some Thoughts on Saving The Federal Judiciary From The Federalization of State Crime*, 43 U. KAN. L. REV. 503, 505 (1995); Rehnquist, *The 1998 Year-End Report on the Federal Judiciary*, at 13 n.2 (1999). Indeed, the federalization of crime "threatens to change entirely the nature of our federal system." Rehnquist, *supra*, at 4. Federal courts that do not enforce the limits of the Commerce Clause, and do not apply federal criminal statutes in light of those limits, exacerbate these deleterious effects on the "sensitive relation between federal and state criminal jurisdiction." *Lopez*, 514 U.S. at 561 n.3. The adverse effect of such judicial acquiescence in unconstitutional extensions of federal power is one that review by this Court can fully remediate.

* * * * *

This case does not concern whether arson of a private residence should be a criminal offense. Had the federal government not asserted jurisdiction in this case, petitioner no doubt would have been prosecuted by the state authorities that arrested him. The decision below threatens to "obliterate the distinction between what is national and what is local," *A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495, 554 (1935) (Cardozo, J., concurring), however, and thus cannot be squared with fundamental principles of limited federal power. Further review is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DONALD M. FALK
Counsel of Record
SHARON SWINGLE
Mayer, Brown & Platt
1909 K Street, N.W.
Washington, DC 20006
(202) 263-3000
Counsel for Petitioner

APPENDICES

APPENDIX A

UNITED STATES of America, Plaintiff–Appellee,

v.

Dewey J. JONES, Defendant–Appellant.

No. 98–3255.

United States Court of Appeals, Seventh Circuit.

Argued April 27, 1999.

Decided May 17, 1999.

Defendant was convicted by jury in the United States District Court for the Northern District of Indiana, William C. Lee, Chief Judge, of arson, making illegal destructive device, and using destructive device during and in relation to crime of violence. Defendant appealed. The Court of Appeals, Easterbrook, Circuit Judge, held that federal arson statute did not exceed Congress' power under Commerce Clause when applied to destruction of residence.

Affirmed.

Commerce ⇐82.6

Federal arson statute did not exceed Congress' power under Commerce Clause when applied to destruction of residence, rather than commercial establishment, inasmuch as statute required proof of some connection between particular arson at issue and interstate commerce, while collective effect of arsons of buildings, or even arsons of residences, established requisite substantial effect on commerce. U.S.C.A. Const. Art. 1, § 8, cl. 3; 18 U.S.C.A. § 844(i).

David H. Miller (argued), Tina L. Nommay, Office of the United States Attorney, Fort Wayne, IN, for Plaintiff–Appellee.

Richard H. Morgan (argued), Pontiac, MI, for Defendant–Appellant.

Before ESCHBACH, EASTERBROOK, and DIANE P. WOOD, Circuit Judges.

EASTERBROOK, Circuit Judge.

Dewey Jones tossed a Molotov cocktail into his cousin's living room; fire severely damaged the home. A jury convicted Jones of arson, 18 U.S.C. § 844(i), making an illegal destructive device (the firebomb), 26 U.S.C. § 5861(f), and using a destructive device during and in relation to a crime of violence (the arson), 18 U.S.C. § 924(c). His appeal challenges only one of these three convictions. Jones contends that § 844(i) exceeds Congress's power under the Commerce Clause (Art. I § 8 cl. 3)

when applied to the destruction of a residence rather than a commercial establishment.

This is a tough row to hoe, and not only because the court has rejected the argument before. *United States v. Stillwell*, 900 F.2d 1104 (7th Cir.1990). Section 844(i) requires proof that the torched property was "used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce". If this is proved, then an adequate connection to interstate commerce is established. So the eighth circuit held in *United States v. Rea*, 169 F.3d 1111 (8th Cir.1999), and *United States v. Flaherty*, 76 F.3d 967, 973–74 (8th Cir.1996), in the course of declaring *United States v. Lopez*, 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995), irrelevant to prosecutions under § 844(i). But it is difficult to dispatch the constitutional objection quite this easily. *Lopez* says that the power of Congress is limited to activities that substantially affect commerce, 514 U.S. at 559, 115 S.Ct. 1624, while proof of a small effect will satisfy the statute. In this case the jury was entitled to conclude that the owner of the residence purchased natural gas in interstate commerce, secured a mortgage from an out-of-state lender, and received an insurance check from an out-of-state insurer. Purchases of gas would diminish while reconstruction occurred, and perhaps the arson would affect repayment of the loan. But these interstate connections are pretty slight for a single building; they don't establish a "substantial" connection between this arson (or this residence) and interstate commerce. So the jury's finding is not necessarily sufficient; and the fact that *Lopez* postdates *Stillwell* means that we cannot rest content with a citation to that case.

Two circuits have distinguished between commercial and residential property and held that the national government lacks the constitutional authority to punish arsons of residences. Compare *United States v. Serang*, 156 F.3d 910 (9th Cir. 1998) (commercial), with *United States v. Pappadopoulos*, 64 F.3d 522 (9th Cir.1995) (residential); compare *United States v. Grimes*, 142 F.3d 1342 (11th Cir.1998) (commercial), with *United States v. Denalli*, 73 F.3d 328 (11th Cir.) (residential), modified on other grounds, 90 F.3d 444 (1996). Jones wants us to follow these decisions. A prior decision declining to do so, *United States v. Hicks*, 106 F.3d 187 (7th Cir.1997), involved a commercial establishment; our statement that there is no constitutional line between commercial and residential property was dictum, Jones insists.

No, it was not dictum. *Hicks* analyzed the scope of national power under the commerce clause and observed that, after *Lopez*, any activity that substantially affects commerce may be regulated. Although living in one's own house is not commerce, the residential housing industry is interstate in character. Goods and materials for housing move across state borders; gas and electricity likewise; the financial and insurance markets that provide loans and spread risks have national if not international scope; arson can substantially affect all of these. This was the background for our statement that "[t]he noncommercial character of the torched building strikes us as irrelevant. The supplying of gas to private homes is a major interstate activity, and its potential disruption by arson is therefore a legitimate matter of federal concern.... The statute requires proof that the arson with which the defendant is charged have some effect on commerce; only it needn't be a large effect, since the sum of many small effects can be a large effect.... Categories such as private residence and rental apartment building do not appear in the commerce clause or the arson statute; nor is there anywhere else in the law to look for guidance as to how finely to categorize the types of property that might be damaged or destroyed by arson. Categorize finely enough and the interstate effects evaporate and the statute is nullified." 106 F.3d

at 189–90. This was why the defendant in *Hicks* was wrong to argue that a substantial effect on commerce had to be established from his particular arson; or from arsons of commercial buildings in Portage, Wisconsin; or from arsons of commercial buildings generally. "Arsons of buildings" substantially affect interstate commerce; that holding of *Hicks* applies to Jones's arson of a residential structure in Indiana just as it applied to Hicks's arson of a commercial structure in Wisconsin.

None of the arguments offered in this case, or by *Pappadopoulos* or *Denalli*, persuades us that *Hicks* or *Stillwell* is wrong. Cases such as *McLain v. Real Estate Board of New Orleans, Inc.*, 444 U.S. 232, 100 S.Ct. 502, 62 L.Ed.2d 441 (1980), conclude that residential property in the aggregate substantially affects interstate commerce. *McLain* holds that an agreement among a few brokers to fix commissions on sales of residential property in New Orleans thus is within the commerce power. See also, e.g., *Goldfarb v. Virginia*, 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975) (attorneys' agreement on fees for residential real estate title searches is within commerce power); *Summit Health, Ltd. v. Pinhas*, 500 U.S. 322, 111 S.Ct. 1842, 114 L.Ed.2d 366 (1991) (exclusion of a single physician from one hospital is within the commerce power because the provision of health care in the aggregate significantly affects commerce).

If instead of asking whether "residential real estate" substantially affects commerce we ask whether "arson of buildings" or even "arson of residences" substantially affects commerce, the answer still must be yes. According to the Federal Bureau of Investigation, there were 69,269 reported arsons in 1997, the most recent year for which complete data are available. *Uniform Crime Reports 1997* Table 2.32 (1998). Of these arsons, 33,848 involved buildings; and 19,888 of the buildings were residential (13,692 single-family dwellings and 6,196 multi-family residences). The damage was a little more than $14,000 per residential arson. *Id.* at Table 2.34. That's a total of approximately $280 million lost to residential arsons in 1997 alone. If even a small fraction of the loss is covered by interstate insurance markets, the effect is "substantial." Most of these arsons also affected gas, electric, and telephone service, required the occupants to stay at hotels while repairs were completed (a sure sign of interstate commerce, see *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 85 S.Ct. 348, 13 L.Ed.2d 258 (1964)), led friends and loved ones to travel from other states to give comfort to the victims, and so on. This collective effect, plus proof of a slight connection between the particular arson and interstate commerce, permits the national government to establish substantive rules of conduct.

AFFIRMED

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	1:98-CR-16
	)	
DEWEY J. JONES	)	

MEMORANDUM OF DECISION AND ORDER

This matter is before the Court on defendant Dewey J. Jones' "Motion for Judgment of Acquittal Following Discharge of Jury" filed June 23, 1998. The government responded to that motion on June 26, 1998. For the following reasons, the motion will be denied.

Discussion

On March 25, 1998, a three count indictment was returned in the above-entitled cause. The charges in the indictment stem from the firebombing of a residential home on Marcy Lane in Fort Wayne, Indiana on February 23, 1998. Count 1 specifically alleged that defendants Dewey J. Jones and Jermaine M. Gist "maliciously damaged and destroyed and attempted to damage and destroy by means of fire and explosive material, real property...used in interstate commerce and in any [sic] activity affecting interstate commerce" in violation of 18 U.S.C. § 844(i) and that they aided and abetted in the same in violation of 18 U.S.C. § 2. Count 2 alleged that both defendants knowingly used or carried a firearm during and in relation to a crime of violence, also in violation of the above statutes. Count 3 alleged that defendant Jones knowingly made a firearm without complying with federal requirements in violation of 28 U.S.C. § 5861(f).

Defendants were tried before a jury commencing on June 17, 1998. At the close of the government's case, this Court entered a judgment of acquittal in favor of defendant Gist. On

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June 17, 1998, the jury returned a verdicts of guilty on all counts with respect to defendant Jones.[1]/

The present motion is directed towards counts one and two. It is defendant 's position that the government failed to establish that the real property was used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce and hence the government failed to prove an essential element for both of those counts.[2]/

A motion for acquittal may not be granted if, viewing the evidence in the light most favorable to the prosecution, there is relevant evidence from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt. *United States .v Reed*, 875 F.2d 107, 111 (7th Cir. 1989); *United States v. Pope*, 739 F.2d 289, 291 (7th Cir. 1984). In applying this standard, it is incumbent upon the court to recognize that it is the jury which has the exclusive authority to assess the witnesses' credibility, resolve evidentiary conflicts and draw reasonable inferences from the evidence presented. *Reed, supra* at 111. "The test that the court must use is whether at the time of the motion there was relevant evidence from which the jury could reasonably find [the defendants] guilty beyond a reasonable doubt." *United States v. Weed*, 689 F.2d 752 (7th Cir. 1982).

The government's evidence at trial tended establish an interstate connection based upon three things: natural gas being supplied to the residence at 2610 Marcy Lane; an insurance claim which was paid by an out-of-state insurer; and mortgage payments which were being paid out-of-state. Briefly, the evidence was as follows:

→Northern Indiana Public Service Company (NIPSCO) supplied

---

[1]/ Since defendant Jones is the only defendant remaining, hereinafter he will be referred to simply as defendant.

[2]/ A similar argument was raised by both defendants in motions to dismiss. This Court denied those motions by order dated May 19, 1998.

> natural gas to the residence on the date of the firebombing. NIPSCO gets its gas from outside of Indiana, generally from Texas or Louisiana or Canadian provinces.
>
> →Midland Mortgage Company had a mortgage on the residence. Monthly mortgage payments were made to Midland in Oklahoma City, Oklahoma. From those payments, insurance premiums were paid annually to American Family Insurance in Indiana.
>
> →American Family Insurance had homeowner's insurance coverage on the house. Its home office is in Madison, Wisconsin and drafts for claims made on the policy (one was made here) are paid via the company's bank in Madison.

It is the government's position that such evidence adequately provided the interstate commerce connection.

In his motion for judgment of acquittal, defendant asserts that the damaged real estate, a private residence, was not shown to have been a part of interstate commerce. With respect to each of the connections sought to be established by the government, the defendant argues:

> "Two representatives from NIPSCO Industries, the parent corporation, testified that this private residence received natural gas from NIPSCO, a subsidiary doing business in Indiana. Both NIPSCO corporations are Indiana Corporations and regulated by the Indiana Regulatory Commission. However, no one from NIPSCO testified that the intrastate services received from NIPSCO Industries or NIPSCO, Inc. were affected in any way as a result of this fire. No one testified that the natural gas lines were damaged in any manner. No one testified that the natural gas services were even turned off as a result of this fire. Finally, no one from NIPSCO testified that they even lost any business whatsoever as a result of this fire.
>
> "As to the Mortgage holder, Midland Mortgage Company, its representative testified that it suffered no loss as a result of this fire. Further, no one, including the Midland Mortgage representative, testified that Midland Mortgage was affected in any manner.
>
> "As to American Family Insurance, the insurance company has 18 to 20 agents in Fort Wayne, Indiana. The insurance company has its own 'Claims office' in Fort Wayne which handled the claim as a

> result of this fire. While the claims agent testified that the settlement 'draft' was written by its out of state bank, the agent did not even know the name of the bank. Further, the agent admitted that this bank may in fact do business in Indiana. No copy of the draft was admitted into evidence. no copy of the canceled check allegedly used to pay this claim was ever introduced into evidence. No evidence was introduced as to where the Walker's did their own banking. For all we know, this was an 'intra-bank' transaction occurring in Fort Wayne, Indiana, with a Fort Wayne, Indiana bank.

(Rec. 59, pp 4-5).

While defendant has raised interesting arguments with respect to the amount of evidence required to prove the interstate commerce nexus, this Court is of the view that prevailing Seventh Circuit law establishes that the evidence offered here is sufficient to support the conviction. Indeed, the natural gas connection alone suffices to supply the interstate commerce element.

In *United States v. Stillwell*, 900 F.2d 1104 (7th Cir. 1990), defendant argued that the residence he was accused of torching was not "used in interstate or foreign commerce" or "in an activity affecting interstate or foreign commerce" as required by the statute because, as stipulated at trial, "the only nexus between Stillwell's house and interstate commerce was that Northern Illinois Gas Company supplied Stillwell's house with natural gas it obtained from sources outside the State of Illinois." *Stillwell*, 900 F.2d at 1106. Noting that "[t]his court has considered, but left open, the question whether the supply of interstate natural gas alone satisfies the arson statute's commerce requirement," the Seventh Circuit held that it "believe[d] Congress intended § 844(i) to reach a private residence which is supplied with natural gas." *Id.*, at 1107.

Later, in *United States v. Hicks*, 106 F.3d 187 (7th Cir. 1997), a case involving the burning of a restaurant that received natural gas, the Seventh Circuit reaffirmed its view of just how far the statute reaches. The court wrote that "the noncommercial character of the torched building

building strikes us as irrelevant" and that "the supplying of gas to private homes is a major interstate activity, and its potential disruption by arson is therefore a legitimate matter of federal concern." *Id.* at 189. The court also wrote:

> The jury question is whether the transaction in issue involved or affected commerce; for that is the commerce element in the statute, as distinct from the constitutional precondition to the statute's being valid. Because the arson statute was intended to exert Congress's full power under the commerce clause to prevent arson...all the jury in our case had to find was a slight effect on interstate commerce, since, as we have explained, that is all that is necessary to bring the aggregation principle into play. The judge instructed the jury that 'the government need only establish a minimal connection between the property at issue and some aspect of interstate commerce.' That is correct. And the burden that this formulation places on the government was carried.

Id. at 190.

Given the holding in *Stillwell* and the language in *Hicks*, it is clear that the motion for judgment of acquittal must be denied. While defendant makes an interesting argument that the evidence did not show any harm to the natural gas supplier, it would not appear that that is required under present Seventh Circuit case law.

Conclusion

On the basis of the foregoing, defendant Dewey J. Jones' "Motion for Judgment of Acquittal Following Discharge of Jury" filed June 23, 1998 is DENIED.

SO ORDERED this 27 day of July 1998.

William C. Lee, Chief Judge
United States District Court

UNITED STATES DISTRICT COURT
Northern District of Indiana
Fort Wayne Division

UNITED STATES OF AMERICA

v.

DEWEY J. JONES

JUDGMENT IN A CRIMINAL CASE

Case Number: 1:98-cr-16

Patrick J. Arata 219/424-1010
Defendant's Attorney

The Defendant: TLN

( ) pleaded guilty to count(s) _____.
( ) pleaded nolo contendere to count(s) _____ which was accepted by the court.
(X) was found guilty on counts 1, 2 and 3 after a plea of not guilty.

E

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18:844(I); 18:2	Damage/ Destruction by means of fire and explosive devices, real property used in interstate commerce; aiding & abetting	2/26/98	1
18:924(c); 18:2	Use of Molotov Cocktail during crime of violence; aiding & abetting	2/26/98	2
26:5861(f)	Unlawful making a firearm (Molotov cocktail)	2/26/98	3

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

( ) The defendant has been found not guilty on count(s) _____.
( ) Count(s) _____ (is)(are) dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 365-84-1943

Defendant's Date of Birth: 12/13/72

Defendant's USM No.: 05411-027

Defendant's Mailing Address:

18150 Patton Street
Detroit, Michigan 48219

Defendant's Residence Address:

defendant incarcerated

AUGUST 26. 1998
Date of Imposition of Sentence

Signature of Judicial Officer

WILLIAM C. LEE, CHIEF JUDGE
Name & Title of Judicial Officer

AUGUST 26. 1998
Date

Defendant: DEWEY J. JONES
Case Number: 1:98-CR-16-1

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of four hundred twenty (420) months, consisting of sixty (60) months on Count 1, forty-six (46) months on count 3, to run concurrently, and three hundred sixty (360) months on Count 2, to run consecutively to count 1 and 3.

( ) The court makes the following recommendations to the Bureau of Prisons:

(X) The defendant is remanded to the custody of the United States Marshal.

( ) The defendant shall surrender to the United States Marshal for this district:

( ) at _____ a.m./p.m. on _____.
( ) as notified by the United States Marshal.

( ) The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.

( ) before 2 p.m. on _____.
( ) as notified by the United States Marshal.
( ) as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____ a

_____, with a certified copy of this judgment.

_____
United States Marshal

By _____
Deputy Marshal

Defendant: DEWEY J. JONES
Case Number: 1:98-CR-16-1

Judgment--Page 3 of

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of five (5) years Count 2 and three (3) years on each of counts 1 and 3, all such terms to run concurrently.

The defendant shall report to the probation office in the district to which the defendant is released within hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.
The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to or drug test within 15 days of release fro n imprisonment and at least two periodic drug tests thereafter, as directed b the probation officer.

( ) The above drug testing condition is suspended based on the court's determination that the defenda poses a low risk of future substance abuse.

(X) The defendant shall not possess a firearm as defined in 18 U.S.C. § 921.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that th defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised releas in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

While defendant is on probation or supervised release pursuant to this Judgment, the defendant shall not commit another federal, sta or local crime. In addition:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and comple written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or oth acceptable reasons;
6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcot or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted a felony unless granted permission to do by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of an contraband observed in plain view by the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement office
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without th permission of the court;
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's crimin record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm th defendant's compliance with such notification requirement.

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Defendant: DEWEY J. JONES
Case Number: 1:98-CR-16-1

Judgment--Page 5 of

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule payments set forth on Sheet 5, Part B.

Count	Assessment	Fine	Restitution
1	$100.00	waived	$77,386.87
2	$100.00	waived	
3	$100.00	waived	

( ) If applicable, restitution amount ordered pursuant to plea agreement $ _____

Totals:	$ 300.00	$ waived	$ 77,386.87

FINE

The above fine includes costs of incarceration and/or supervision in the amount of $ _____.

The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the fifteenth day after the da of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for default an delinquency pursuant to 18 U.S.C. § 3612(g).

( ) The court has determined that the defendant does not have the ability to pay interest and it is ordered that:

( ) The interest requirement is waived.

( ) The interest requirement is modified as follows:

RESTITUTION

( ) The determination of restitution is deferred in a case brought under Chapters 109A, 110, 110A, and 113A of Title 18 for offense committed on or after 09/13/1994, until _____. An Amended Judgment in a Criminal Case will be entered after such determination

( ) The defendant shall make restitution to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwis in the priority order or percentage payment column below.

Name of Payee	*Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment
American Family Ins.	$77,386.87	$77,386.87	
Totals:	$77,386.87	$77,386.87	$

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses commit on or after September 13, 1994.

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost o: prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A (X) ASSESSMENT in full immediately; or

B (X) RESTITUTION payments shall be made from any wages the defendant may earn in prison in accordance with the Bureau of Prisons' Inmate Financial Responsibility Program. Any portion of the restitution that is not paid in full at the time of the defendant's release from imprisonment shall become a condition of supervision.

C ( ) not later than _____; or

D ( ) in installments to commence _____ days after the date of this judgment. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due, and shall request the court to establish a payment schedule if appropriate; or

E ( ) in _____ (e.g., equal, weekly, monthly, quarterly) installments of $_____ over a period of _____ year(s) to commence _____ days after the date of this judgment.

The National Fine Center will credit the defendant for all payments previously made toward any criminal monetary penalties imposed.

Special instructions regarding the payment of criminal monetary penalties:

( ) The defendant shall pay the costs of prosecution.

( ) The defendant shall forfeit the defendant's interest in the following property to the United States:

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment.

STATEMENT OF REASONS

(X) The court adopts the factual findings and guideline application in the presentence report.

OR

( ) The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

Guideline Range Determined by the Court:

Total Offense Level: 21

Criminal History Category: III

Imprisonment Range: 46 to 57 months on each of counts 1 and 3 (mandatory minimum 60 months on count 1, by statute)
30 years statutory mandatory minimum on Count 2

Supervised Release Range: 3 to 5 years

Fine Range: $7,500 to $75,000

(X) Fine waived or below the guideline range because of inability to pay.

Total Amount of Restitution: $77,386.87

( ) Restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashionin of a restitution order outweighs the need to provide restitution to any victims, pursuant to 18 U.S.C. § 3663(d).

( ) For offenses that require the total amount of loss to be stated, pursuant to Chapters 109A, 110, 110A, and 113A of Title 18 restitution is not ordered because the economic circumstances of the defendant do not allow for the payment of any amoun of a restitution order, and do not allow for the payment of any or some portion of a restitution order in the foreseeable futur under any reasonable schedule of payments.

( ) Partial restitution is ordered for the following reason(s):

(X) The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from th sentence called for by the application of the guidelines.

OR

( ) The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s)

OR

( ) The sentence departs from the guideline range:

( ) upon motion of the government, as a result of defendant's substantial assistance.

( ) for the following specific reason(s):

ADDITIONAL CONDITIONS OF SUPERVISION

The defendant shall participate, under a co-payment plan, in a drug aftercare treatment program which may include urine testing at th direction and discretion of the probation officer. As part of the co-payment program, the defendant will be held responsible for 3% pe $100.00 of his net wages as determined by the probation office. If the defendant is unemployed or receiving public assistance, the defendan will be held responsible for a co-payment of $10.00 per month. Payments are to be made on a per visit basis.

IN THE
SUPREME COURT OF THE UNITED STATES

DEWEY J. JONES, PETITIONER,

v.

UNITED STATES OF AMERICA, RESPONDENT.

RECEIVED
HAND DELIVERED
AUG 13 1999
OFFICE OF THE CLERK
SUPREME COURT, U.S.

CERTIFICATE OF SERVICE

I, Donald M. Falk, counsel for Dewey J. Jones, and a member of the Bar of this Court, hereby certify that on this 13th day of August, 1999, one copy of the Motion for Leave to Proceed In Forma Pauperis and one copy of the Declaration in Support of Motion for Leave to Proceed In Forma Pauperis in the above-captioned case were served by hand delivery on the following counsel for the United States of America:

Solicitor General of the United States
Room 5614
Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

I further certify that all parties required to be served have been served.

DONALD M. FALK
Mayer, Brown & Platt
1909 K Street, N.W.
Washington, D.C. 20006-1101
(202) 263-3000

IN THE
SUPREME COURT OF THE UNITED STATES

DEWEY J. JONES, PETITIONER,

v.

UNITED STATES OF AMERICA, RESPONDENT

RECEIVED
HAND DELIVERED
AUG 13 1999
OFFICE OF THE CLERK
SUPREME COURT, U.S.

CERTIFICATE OF SERVICE

I, Donald M. Falk, counsel for Dewey J. Jones, and a member of the Bar of this Court, hereby certify that on this 13th day of August, 1999, one copy of the Petition for a Writ of Certiorari in the above-captioned case was served by hand delivery on the following counsel for the United States of America:

Solicitor General of the United States
Room 5614
Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

I further certify that all parties required to be served have been served.

DONALD M. FALK
Mayer, Brown & Platt
1909 K Street, N.W.
Washington, D.C. 20006-1101
(202) 263-3000

MAYER, BROWN & PLATT
1909 K STREET, N.W.
WASHINGTON, D.C. 20006-1101

SHARON SWINGLE
DIRECT DIAL (202) 263-3284
sswingle@mayerbrown.com

MAIN TELEPHONE
202-263-3000
MAIN FAX
202-263-3300

August 13, 1999

VIA MESSENGER

The Honorable William K. Suter
Clerk
Supreme Court of the United States
Washington, D.C. 20543

Re: *Dewey J. Jones* v. *United States of America*, No. _____

Dear Mr. Suter:

I am enclosing for filing one original and eleven copies of a Petition for Certiorari in the above-captioned case, as well as one original and eleven copies of petitioner's Motion for Leave to Proceed In Forma Pauperis and Declaration in Support of Motion for Leave to Proceed In Forma Pauperis, attached to the original and copies of the petition. Please date stamp the extra copies of the petition, motion, and declaration in support of the motion, and return them to the messenger.

Thank you for your consideration of this matter.

Very truly yours,

Sharon Swingle

Enclosures
cc: All Counsel

CHICAGO BERLIN CHARLOTTE COLOGNE HOUSTON LONDON LOS ANGELES NEW YORK WASHINGTON
INDEPENDENT MEXICO CITY CORRESPONDENT: JAUREGUI, NAVARRETE, NADER Y ROJAS
INDEPENDENT PARIS CORRESPONDENT: LAMBERT & LEE

ORIGINAL

No. 99-5739

Supreme Court, U.S.
FILED
OCT 8 1999
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

DEWEY J. JONES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

SETH P. WAXMAN
Solicitor General
Counsel of Record

JAMES K. ROBINSON
Assistant Attorney General

DAVID S. KRIS
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

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SUPREME COURT, U.S.

QUESTION PRESENTED

Whether 18 U.S.C. 844(i), which prohibits arson of a building or other property "used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce," was properly applied to a residence whose owner purchased natural gas in interstate commerce, secured a mortgage from an out-of-state lender, and received an insurance check from an out-of-state insurer.

IN THE SUPREME COURT OF THE UNITED STATES

No. 99-5739

DEWEY J. JONES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is reported at 178 F.3d 479. The opinion of the district court denying petitioner's motion for judgment of acquittal (Pet. App. 4a-8a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 17, 1999. The petition for a writ of certiorari was filed on August 13, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Indiana, petitioner was convicted on one

count of arson, in violation of 18 U.S.C. 844(i); one count of making an illegal destructive device, in violation of 26 U.S.C. 5861(f); and one count of using a destructive device during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c). Pet. App. 9a. He was sentenced to 420 months' imprisonment, to be followed by five years' supervised release. Id. at 10a-11a. The court of appeals affirmed the arson conviction. Id. at 1a-3a.

1. Petitioner threw a Molotov cocktail into the home of his cousin, causing the home to be severely damaged by fire. Pet. App. 1a. The government's evidence at trial established that the home was supplied with natural gas produced outside the State; that an insurance claim was paid by an out-of-state insurer, and that mortgage payments on the property were being made to an out-of-state lender. Id. at 5a-6a. Petitioner was convicted of violating, inter alia, 18 U.S.C. 844(i), which establishes criminal penalties for any person who "maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce."

2. On appeal, petitioner sought reversal of his arson conviction, arguing that Section 844(i) "exceeds Congress's power under the Commerce Clause * * * when applied to the destruction of a residence rather than a commercial establishment." Pet. App. 1a-2a. The court of appeals affirmed petitioner's conviction. It observed that "the owner of the residence purchased natural gas in

interstate commerce, secured a mortgage from an out-of-state lender, and received an insurance check from an out-of-state insurer." Ibid. The court acknowledged that "these interstate connections are pretty slight for a single building," but it concluded that "proof of a small effect will satisfy the statute." Ibid.

The court of appeals explained that under this Court's decision in United States v. Lopez, 514 U.S. 549 (1995),

> any activity that substantially affects commerce may be regulated. Although living in one's own house is not commerce, the residential housing industry is interstate in character. Goods and materials for housing move across state borders; gas and electricity likewise; the financial and insurance markets that provide loans and spread risks have national if not international scope; arson can substantially affect all of these.

Pet. App. 2a. The court cited a Federal Bureau of Investigation report stating that 19,888 private residences were subjected to arson in 1997, and that the average "damage was a little more than $14,000 per residential arson," for a "total of approximately $280 million lost to residential arsons in 1997 alone." Id. at 3a. The court held that "[t]his collective effect, plus proof of a slight connection between the particular arson and interstate commerce, permits the national government to establish substantive rules of conduct." Ibid.

The court of appeals stated that "[t]wo circuits have distinguished between commercial and residential property and held that the national government lacks the constitutional authority to punish arsons of residences." Pet. App. 2a (citing United States

v. Pappadopoulos, 64 F.3d 522 (9th Cir. 1995), and United States v. Denalli, 73 F.3d 328 (11th Cir.) (per curiam), modified on other grounds, 90 F.3d 444 (1996)). The court stated that "[n]one of the arguments offered * * * by Pappadopoulos or Denalli persuades us that" prior circuit decisions upholding convictions for arson at private residences were erroneous. Pet. App. 3a. The court relied on this Court's decisions in McLain v. Real Estate Board of New Orleans, Inc., 444 U.S. 232 (1980), and Goldfarb v. Virginia, 421 U.S. 773 (1975), to support its conclusion that the Commerce Clause authorizes Congress to regulate and protect residential property. See Pet. App. 3a.

ARGUMENT

Petitioner contends that the court of appeals' decision in this case conflicts with decisions of the Ninth and Eleventh Circuits, which have reversed convictions under Section 844(i) for lack of a sufficient commerce nexus in cases involving arson of residential property. Although the decision below is concededly in tension with the cases on which petitioner relies, no square conflict exists. We therefore do not believe that plenary review by this Court is warranted at present.

On September 28, 1999, however, this Court granted the petitions for certiorari in United States v. Morrison, No. 99-5, and Brzonkala v. Morrison, No. 99-29. Because the Court's decision in those consolidated cases may affect the proper resolution of the question presented here, the petition should be held pending this

Court's decision in Nos. 99-5 and 99-29, and then disposed of as appropriate.

1. In United States v. Russell, 471 U.S. 858 (1985), this Court upheld a federal conviction for arson involving a two-unit apartment building used as rental property. The Court recognized that Section 844(i)'s "reference to `any building . . . used . . . in any activity affecting interstate or foreign commerce' expresses an intent by Congress to exercise its full power under the Commerce Clause." Id. at 859.[1] The Court held that "[t]he rental of real estate is unquestionably" an activity that affects interstate commerce, explaining that "[w]e need not rely on the connection between the market for residential units and `the interstate movement of people,' to recognize that the local rental of an apartment unit is merely an element of a much broader commercial market in rental properties." Id. at 862 (footnote omitted) (quoting McLain v. Real Estate Board of New Orleans, Inc., 444 U.S. 232, 245 (1980)). The Court went on to state that "[t]he congressional power to regulate the class of activities that constitute the rental market for real estate includes the power to regulate individual activity within that class." Ibid.

In United States v. Lopez, 514 U.S. 549 (1995), this Court, while invalidating a statute that regulated noncommercial activity

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[1] The Court also observed that "the legislative history [of the statute] suggests that Congress at least intended to protect all business property, as well as some additional property that might not fit that description, but perhaps not every private home." 471 U.S. at 862.

(possession of a gun in a school zone) and that lacked a jurisdictional element, recognized that statutes with jurisdictional elements are facially constitutional because the element "ensure[s], through case-by-case inquiry, that the [crime] in question affects interstate commerce." 514 U.S. at 561. As an example of such a statute, the Court cited former 18 U.S.C. 1202(a), which made it a crime for a felon to possess a firearm "in commerce or affecting commerce." Id. at 561-562. The Court explained that the jurisdictional element in former Section 1202(a) limited the statute's "reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce." Id. at 562.

Under Russell and Lopez, the application of the arson statute to the facts of this case is constitutional. Section 844(i)'s jurisdictional element ensures that the statute applies only to acts of arson that are shown to have a discernible effect on interstate commerce. And, considered in the aggregate, those acts have a substantial effect on interstate commerce. See Pet. App. 3a (FBI statistics show "a total of approximately $280 million lost to residential arsons in 1997 alone").

Petitioner argues (Pet. 11-18) that the "class of activities" approach does not apply to the arson statute because "simple arson" is not an "economic activity." When arson damages or destroys a building used in or affecting commerce, however, the crime is no longer simple arson. It is, instead, arson that has a particularized nexus to interstate commerce. By including a

jurisdictional element in Section 844(i), Congress defined a category of arson offenses that are connected to interstate commerce, and that accordingly may be considered as a class to establish a substantial effect under Lopez.[2]

2. Since Lopez, the courts of appeals have continued to use Russell's "class of activities" approach to determine the constitutional limits of the arson statute.[3] As the Eleventh

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[2] Petitioner also argues (Pet. 18-21) that the home in this case was not "used" within the meaning of Section 844(i). It does not appear that petitioner raised that claim in the court of appeals. See Pet. App. 1a-2a; Pet. C.A. Br. 9, 12. Petitioner's question presented in this Court is "whether, in light of *United States* v. *Lopez*, 514 U.S. 549 (1995), Section 844(i) may be constitutionally applied to the arson of real property that is not actively used in any commercial activity and that lacks any substantial connection with interstate commerce." Pet. I.

[3] See, e.g., United States v. Serang, 156 F.3d 910, 913-914 (9th Cir.) (upholding arson conviction and stating that "even if a single instance of the regulated activity has only a trivial effect on commerce, if the class of activities regulated substantially affects commerce in the aggregate, then the conduct falls within Congress's commerce power") (quoting United States v. Gomez, 87 F.3d 1093, 1096 (9th Cir. 1996)), cert. denied, 119 S. Ct. 627 (1998); United States v. Dascenzo, 152 F.3d 1300, 1302 n.6 (11th Cir. 1998) (upholding arson conviction; "Lopez, as a matter of constitutional law, only requires that the entirety of the `activity' regulated by the statute `substantially affect' interstate commerce"); United States v. Viscome, 144 F.3d 1365, 1369-1370 n.9 (11th Cir.) (upholding arson conviction; "[t]he conclusion that Lopez does not require an individualized finding of `substantial effect' to sustain a conviction under § 844(i)'s second prong is consistent with the holdings of several other circuits"), cert. denied, 119 S. Ct. 362 and 119 S. Ct. 435 (1998); United States v. Latouf, 132 F.3d 320, 327 (6th Cir. 1997) (upholding arson conviction; "[a]lthough these contacts standing alone may not have been sufficient to demonstrate the requisite `substantial' effect on interstate commerce, this court must consider these contacts in the aggregate"), cert. denied, 523 U.S. 1086, 1101 and 524 U.S. 920 (1998); United States v. McMasters, 90 F.3d 1394, 1399 (8th Cir. 1996) (affirming arson conspiracy conviction because "renting a house is the sort of economic activity that might, through repetition elsewhere, substantially

Circuit has explained, "Lopez does not require a substantial effect on interstate commerce to result from each individual criminal act or from the specific property involved in each criminal act," but only that the relevant class of activity -- "arson of property used in commerce or used in an activity affecting commerce" -- exert a substantial effect. United States v. Dascenzo, 152 F.3d 1300, 1303 n.6 (11th Cir. 1998). The courts of appeals have generally used the same "class of activities" approach in reviewing convictions under other federal criminal statutes containing jurisdictional elements.[4]

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affect interstate commerce"), cert. denied, 519 U.S. 1071, 1099 (1997); but see United States v. Corona, 108 F.3d 565, 570 (5th Cir. 1997) (upholding arson conviction but stating in dicta that "[w]ithout challenging the general thrust of the aggregation principle, we doubt that an effect as small as the cessation of natural gas service to a single household satisfies the constitutional requirement").

[4] See, e.g., United States v. Guerra, 164 F.3d 1358, 1361 (11th Cir. 1999) (affirming conviction for robbery in violation of the Hobbs Act, 18 U.S.C. 1951; "an individual defendant's conduct need not substantially affect commerce precisely because the Hobbs Act regulates general conduct -- robberies and extortion -- which in the aggregate affects commerce substantially"); United States v. Atcheson, 94 F.3d 1237, 1241-1243 (9th Cir. 1996) (reaffirming that "de minimis" effect on commerce is sufficient in individual Hobbs Act case), cert. denied, 519 U.S. 1156 (1997); United States v. Goodwin, 141 F.3d 394, 400 (2d Cir. 1997) (affirming conviction for money laundering, in violation of 18 U.S.C. 1956; "Lopez demands only that all of the regulated activity, taken in the aggregate, substantially affect interstate or foreign commerce"), cert. denied, 523 U.S. 1086 and 119 S. Ct. 190 (1998); cf. United States v. Hickman, 179 F.3d 230, 231 (5th Cir. 1999) (en banc) (per curiam) (upholding Hobbs Act convictions by evenly divided court; dissent states that "[w]e would hold that substantial effects upon interstate commerce may not be achieved by aggregating diverse, separate individual instances of intrastate activity where there is no rational basis for finding sufficient connections between them"), petitions for cert. pending, Nos. 99-5614, 99-464, 99-6259, 99-6302.

As petitioner explains (Pet. 8-9), two courts of appeals have indicated that Congress may not proscribe the arson of a private home absent a "substantial" effect on commerce in the individual case. In United States v. Pappadopoulos, 64 F.3d 522 (9th Cir. 1995), the Ninth Circuit reversed an arson conviction involving a private home where "the government relied exclusively on one theory" to establish a commerce nexus: "that the * * * residence was `used in' or `used in an activity affecting' interstate commerce because it received natural gas from out-of-state sources." Id. at 525; see id. at 526 (the home's "only relationship to interstate commerce was that it received a supply of natural gas from a company that obtained some of that gas from outside the state").[5] The Ninth Circuit determined that

> in a case such as this, where Congress seeks to regulate a purely intrastate noncommercial activity * * * and where the connection of the regulated activity as a whole to interstate commerce is neither readily apparent nor illuminated by express congressional findings, the government must satisfy the jurisdictional requirement by pointing to a "substantial" effect on or connection to interstate commerce [in the individual case].

Id. at 527. It held that "the receipt of natural gas * * * from out-of-state sources is insufficient as a matter of law to confer federal jurisdiction over the section 844(i) count." Ibid.; see id. at 528 ("Where the sole source of the interstate commerce

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[5] The jury in Pappadopoulos was instructed that "[a] building, including a private residence, is used in interstate commerce, or in an activity affecting interstate commerce, if it is supplied with natural gas which has moved in interstate commerce." 64 F.3d at 525 (quoting jury instructions).

connection is the receipt by a private home of natural gas * * *, federal jurisdictional requirements have not been met").

In United States v. Denalli, 73 F.3d 328 (11th Cir.) (per curiam), modified on other grounds, 90 F.3d 444 (1996), the Eleventh Circuit reversed an arson conviction involving a private home where the only evidence of a commerce nexus was that the homeowner "maintained an office in his private residence equipped with a personal computer" that he used to print memoranda for his job in an international corporation. 73 F.3d at 330. The court of appeals described the computer and the circumstances of its use:

> [The company] did not require [the homeowner] to maintain an office at home, and it did not require him to create the memoranda at home. [The] computer was not linked to any [company] computer. It was not equipped with a modem. It had no link to interstate phone lines or other interstate connections. The memoranda were not incorporated by disks or other electronic means to any [company] computers. [The homeowner] would print the memoranda on his personal printer and physically carry them to employees at [the company]. He conducted no further activity for [the company] at his residence that affected interstate commerce.

Id. at 330-331. Based on that evidence, the court held that "[n]o substantial effect on interstate commerce was proved." Id. at 331.

Neither Pappadopoulos nor Denalli squarely conflicts with the decision below. In Pappadopoulos, the only commerce nexus was the receipt of interstate natural gas, while in this case the court of appeals relied in addition on the out-of-state mortgage and insurance policy. In Denalli, the only commerce nexus was the stand-alone computer; the government did not rely on evidence

concerning interstate utilities, a mortgage, or insurance.[6] And any disagreement among the courts of appeals regarding the precise scope of the arson statute is of slight importance in light of the broad general agreement as to the applicable constitutional principles. See notes 3 and 4, supra.

3. For the foregoing reasons, the petition for certiorari does not warrant plenary review by this Court. The appropriate disposition of this case may be affected, however, by the Court's decision in United States v. Morrison, No. 99-5 (cert. granted Sept. 28, 1999), and Brzonkala v. Morrison, No. 99-29 (cert. granted Sept. 28, 1999). Those consolidated cases present the question (inter alia) whether 42 U.S.C. 13981, which creates a private right of action for victims of gender-motivated violence, is a permissible exercise of Congress's power under the Commerce Clause. The Court's decision in those cases may clarify the extent to which federal regulation of violent private conduct may be based upon the anticipated effects of such conduct on the national economy. The petition in this case should therefore be held pending this Court's decision in Nos. 99-5 and 99-29, and then disposed of as appropriate.

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[6] See Belflower v. United States, 129 F.3d 1459, 1461-1462 & n.4 (11th Cir. 1997) (per curiam) ("Denalli simply seems to represent the unusual and rare case envisioned by the Supreme Court when it recognized that `perhaps not every private home' will fall within the scope of § 844(i)"), cert. denied, 524 U.S. 921 (1998).

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in United States v. Morrison, No. 99-5 (cert. granted Sept. 28, 1999), and Brzonkala v. Morrison, No. 99-29 (cert. granted Sept. 28, 1999), and then disposed of as appropriate.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

JAMES K. ROBINSON
Assistant Attorney General

DAVID S. KRIS
Attorney

OCTOBER 1999

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Supreme Court
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No. 99-5739

IN THE SUPREME COURT OF THE UNITED STATES

DEWEY J. JONES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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REPLY BRIEF FOR THE PETITIONER

DONALD M. FALK
Counsel of Record
SHARON SWINGLE
Mayer, Brown & Platt
1909 K Street, N.W.
Washington, DC 20006
(202) 263-3000

Counsel for the Petitioner

TABLE OF AUTHORITIES

Cases — **Page(s)**

Belflower v. *United States*, 129 F.3d 1459 (11th Cir. 1997) 4

United States v. *Bishop*, 66 F.3d 569 (3d Cir. 1995) 6

United States v. *Chisholm*, 105 F.3d 1357 (11th Cir. 1997) 4

United States v. *Dascenzo*, 152 F.3d 1300 (11th Cir. 1998) 4

United States v. *Denalli*, 73 F.3d 328 (11th Cir.), modified on other grounds, 90 F.3d 444 (1996) 2, 3, 4, 5

United States v. *Latouf*, 132 F.3d 320 (6th Cir. 1997), cert. denied, 118 S. Ct. 1542 (1998) 3, 5

United States v. *Lopez*, 514 U.S. 549 (1995) ..... *passim*

United States v. *McGuire*, 178 F.3d 203 (3d Cir. 1999) 3

United States v. *Pappadopoulos*, 64 F.3d 522 (9th Cir. 1995) 2, 3, 5

United States v. *Rea*, 169 F.3d 1111 (8th Cir.), petition for cert. filed, No. 99-6136 (July 14, 1999) 5

United States v. *Russell*, 471 U.S. 858 (1985) 5, 7, 8

United States v. *Stillwell*, 900 F.2d 1104 (7th Cir. 1990) 3

United States v. *Tocco*, 135 F.3d 116 (2d Cir.), cert. denied, 118 S. Ct. 1581 (1998) 5

United States v. *Viscome*, 144 F.3d 1365 (11th Cir.), cert. denied, 119 S. Ct. 362 (1998) 4, 6

Constitutional and Statutory Provisions

U.S. CONST., art. I, § 8 ..... *passim*

18 U.S.C. § 844(i) ..... *passim*

REPLY BRIEF FOR THE PETITIONER

The government concedes that the decisions of the courts of appeals addressing the question presented are, at the very least, in "tension" (U.S. Br. 4) and it does not dispute that the question presented is recurring. The government does not seriously dispute that the limits on constitutional application of Section 844(i) are important. Rather, the government tries to obscure the importance of the Circuits' conflicting conclusions about the application of Section 844(i) to private residences — and the diametrically opposed constitutional analyses engaged in by those courts — by relying, misleadingly, on what it terms "broad general agreement as to the applicable constitutional principles" (*id.* at 11) when actively used *commercial* property is at issue. And the government has nothing to say in response to our demonstration that the Seventh Circuit's reasoning would support a general federal police power despite this Court's contrary holding in *United States* v. *Lopez*, 514 U.S. 549, 566 (1995). Indeed, the government concedes that the petition should not be denied. *Id.* at 4, 12. The only real dispute relevant to the disposition of the petition, then, is whether it should be granted now or later.

The deep division among the courts of appeals warrants immediate and plenary resolution by this Court. The government tries to paper over the square conflict by citing insubstantial factual distinctions. But in claiming that courts generally apply the aggregation analysis used in the decision below, the government simply tries to wish away the entirely different and irreconcilable analysis applied by the courts in conflict with that decision. Indeed, in asserting that there is a majority view on Commerce Clause analysis under other federal criminal statutes, the government — when citing contrary authority (U.S. Br. 7-8 &

nn.3-4) — simply demonstrates that the conflict resolvable by a grant of this petition is mirrored in decisions affecting other statutes and thus is both more real and more important than the government lets on.

There also is no substance to the government's assertion that plenary review should be withheld until the Court decides the consolidated cases of *United States* v. *Morrison*, No. 99-5, and *Brzonkala* v. *Morrison*, No. 99-29. The government ignores the controlling difference between *Morrison* and this case: there is no jurisdictional element in the statute under review in *Morrison*, but the constitutional analysis applicable to statutes with such elements is the *only* issue here. This case and *Morrison* should be reviewed in tandem.

1. The government admits that the decision of the Seventh Circuit is in "tension" with decisions by other courts of appeals. U.S. Br. 4. But "tension" understates the deep division among the Circuits over the constitutional limits on the application of Section 844(i) to arson of property not actively used in a commercial activity. This conflict in part reflects another: the courts of appeals are also split over whether the analysis of substantial effects articulated by this Court in *Lopez* applies to statutes with an express jurisdictional element. Pet. 8-11. This Court should grant review to resolve these important and related conflicts.

The courts in *United States* v. *Pappadopoulos*, 64 F.3d 522 (9th Cir. 1995), and *United States* v. *Denalli*, 73 F.3d 328 (11th Cir.), modified on other grounds, 90 F.3d 444 (1996), refused to apply Section 844(i) to arson of residential properties with only minimal and attenuated links to interstate commerce, and declined to apply the sweeping aggregation

analysis endorsed by the government and relied on by the Seventh Circuit. The government nonetheless asserts (U.S. Br. 4) that "no square conflict exists."

Certainly the Seventh Circuit labored under no such illusions. That court recognized that its decision conflicted with *Denalli* and *Pappadopoulos* notwithstanding minor factual differences in the cases, but explicitly disagreed with those decisions. Pet. App. 3a. Other courts of appeals have acknowledged the same circuit split. See, *e.g.*, *United States* v. *McGuire*, 178 F.3d 203, 210 (3d Cir. 1999); *United States* v. *Latouf*, 132 F.3d 320, 326 (6th Cir. 1997), cert. denied, 118 S. Ct. 1542 (1998).

The government claims to know better than the courts embroiled in the conflict. "In *Pappadopoulos*," the government asserts, "the only commerce nexus was the receipt of interstate natural gas, while in this case the court of appeals relied in addition on the out-of-state mortgage and insurance policy." U.S. Br. 10. The government does not explain why this distinction should make a difference. If a single *de minimis* link to interstate commerce standing alone would not bring the application of Section 844(i) into compliance with the Commerce Clause, three such insubstantial links should fare no better. Zero plus zero plus zero is still zero.

In any event, the Seventh Circuit made clear that the receipt of natural gas, standing alone, would suffice in that Circuit. The court of appeals affirmed (Pet App. 2a) the continuing vitality, after *Lopez*, of its earlier decision in *United States* v. *Stillwell*, 900 F.2d 1104 (7th Cir. 1990). In *Stillwell*, as in *Pappadopoulos*, the only connection to interstate commerce

was the provision of natural gas from out-of-state sources to the private residence. See *id.* at 1106. The square conflict with *Pappadopoulos* is both acknowledged and undeniable.

Likewise, the evidence in *Denalli* — that the owner periodically used his home computer in working for an company engaged in interstate commerce — established a stronger and more direct connection between interstate commerce and residential property than the Seventh Circuit deemed sufficient for constitutional application of the statute. Indeed, it exceeded the evidence in this case, as the intermittent "use" of the computer at least arguably came within the terms of the jurisdictional element of Section 844(i), which is more than can be said for the passive connections relied upon by the Seventh Circuit. Certainly there is no doubt that the conviction in *Denalli* would have been upheld in the Seventh Circuit, while the passive connections to commerce in this case would have fallen short of the requirements imposed by the Eleventh Circuit.[1]

The government also is off-base in suggesting (U.S. Br. 7, 11) that the courts of appeals are not divided over the application to Section 844(i) of the substantial effects analysis set out in *Lopez*. As the petition explained, two circuits have held that *Lopez* is wholly inapplicable to Section 844(i) because it contains an express jurisdictional element,

[1] The government implies that the Eleventh Circuit has receded from *Denalli*. U.S. Br. 11 n.6 (quoting *Belflower* v. *United States*, 129 F.3d 1459, 1461-1462 & n.4 (11th Cir. 1997)). To the contrary, the Eleventh Circuit has repeatedly recognized that *Denalli* bars application of Section 844(i) to arson of private, owner-occupied residences. See *United States* v. *Dascenzo*, 152 F.3d 1300, 1303 (11th Cir. 1998); *United States* v. *Viscome*, 144 F.3d 1365, 1368 (11th Cir.), cert. denied, 119 S. Ct. 362 (1998)); *Belflower*, 129 F.3d at 1461-1462 n.4; *United States* v. *Chisholm*, 105 F.3d 1357, 1357-1358 & n.2 (11th Cir. 1997).

and thus the government need show only a *de minimis* connection to interstate commerce. Pet. 10 (discussing *United States* v. *Rea*, 169 F.3d 1111, 1113 (8th Cir.), petition for cert. filed, No. 99-6136 (Jul. 14, 1999), and *United States* v. *Tocco*, 135 F.3d 116, 123-124 (2d Cir.), cert. denied, 118 S. Ct. 1581 (1998)). Four circuits have held that *Lopez* applies to Section 844(i) notwithstanding the statute's express jurisdictional requirement, and requires that the interstate commerce connection satisfy some variation of the substantial effects analysis. See Pet. App. 2a-3a; Pet. 10 (discussing *Pappadopoulos*, *Denalli*, and *Latouf*, 132 F.3d at 325-327). Even the latter courts disagree on the scope of the inquiry, particularly on the use of the aggregation analysis used below. If this is "broad general agreement," as the government contends (see U.S. Br. 11), it is difficult to imagine what would constitute conflict.[2]

2. The government tries to postpone this Court's review based on the grants of certiorari in *United States* v. *Morrison*, No. 99-5, and *Brzonkala* v. *Morrison*, No. 99-29. See U.S. Br. 4-5, 10. The government makes no effort to show how *Morrison* would affect resolution of this case, beyond an unexplained contention that a decision in *Morrison* might

[2] The government also cites numerous cases involving rental and other commercial property for the proposition that the lower courts are in general agreement about the proper application of Section 844(i). U.S. Br. 7-8 n.3. But the issue presented in this case is not whether Section 844(i) applies to property in active commercial use — a question that this Court answered in *United States* v. *Russell*, 471 U.S. 858 (1985), suggesting the constitutionality of that application as well — but whether the Commerce Clause permits it to be applied to property that is not rented or used commercially, based solely on *de minimis* and indirect connections to interstate commerce.

"clarify the extent to which federal regulation of violent private conduct may be based upon the anticipated effects of such conduct on the national economy." *Id.* at 11.

The government's failure to explain exactly how *Morrison* might affect the disposition of this case is unsurprising. *Morrison* focuses on Congress's power, after *Lopez*, to proscribe certain non-commercial activity in the Violence Against Women Act (VAWA) without including an express jurisdictional element in the statute. This case, by contrast, focuses entirely on the constitutional limits on the application of precisely the type of jurisdictional element that is absent from the VAWA. Thus, *Morrison* does not raise the key issue presented here: whether and how the constitutional limitations articulated in *Lopez* apply to a statute that contains an express jurisdictional element.

The government must be aware of that controlling distinction. Its petition in *Morrison* pointed out that the Fourth Circuit's *en banc* decision in that case expressly relied on the absence of a jurisdictional element as a basis for finding the VAWA unconstitutional. See *Morrison* Pet. 14, No. 99-5.

Indeed, the government has repeatedly claimed that the presence of an express jurisdictional element in a statute, as in this case, renders *Lopez* inapplicable. See, *e.g.*, *Viscome*, 144 F.3d at 1369 n.9; *United States* v. *Bishop*, 66 F.3d 569, 585 (3d Cir. 1995). The government undoubtedly will try to avoid aspects of this Court's decision in *Morrison* on the ground that statutes containing express jurisdictional elements are subject to a far more forgiving constitutional analysis, just as it has done with *Lopez*.

Morrison provides no reason to deny plenary review in this case. The issues in *Morrison* and those in this case are complementary, not overlapping. By granting plenary review now, the Court could consider at one swoop the application of the substantial effects test to federal regulation of non-economic activity with or without reliance on jurisdictional elements. To delay review of this case would permit the government (and some lower courts) to continue to disregard the limits on the exercise of the commerce power.

3. The government also argues that the decision below was correct. That argument at most could reinforce the need to resolve the conflict among the Circuits, but the government is wrong in any event.

The government asserts (U.S. Br. 5-6) that this Court's decisions in *Lopez* and *United States* v. *Russell*, 471 U.S. 858 (1985), permit application of Section 844(i) to arson of property that is not actively used for a commercial purpose. So long as the individual arson has a *de minimis* connection to interstate commerce and the total economic effect of residential arsons is substantial, the government contends, Section 844(i) may be constitutionally applied.

That argument proceeds as if *Lopez* did not exist. The government relies on aggregating the effects of all residential arsons on interstate commerce to conclude that there is a sufficient basis for federal regulation under the commerce power. But the federal arson statute does not qualify for such constitutional sleight-of-hand. Section 844(i) is not "a general regulatory statute" that "bears a substantial relation to commerce." *Lopez*, 514 U.S. at 558 (internal quotation marks omitted). And arson neither "arise[s] out of" nor is

"connected with a commercial transaction" of any kind. *Id.* at 561. Aggregation is impermissible here.

Moreover, the government's sweeping approach would cancel the winnowing effect of the very jurisdictional element that alone can render Section 844(i) facially constitutional. As this Court has explained, jurisdictional elements must establish sufficiently substantial connections with commerce through "case-by-case inquiry." *Lopez*, 514 U.S. at 561-562. The government's position not only makes that inquiry virtually meaningless, but disregards the plain meaning of "use" in Section 844(i), a meaning that requires active employment.[3] See Pet. 19. Nothing in *Russell* or *Lopez* supports the government's gloss that reduces "use" to a vague invocation of any indirect and attenuated connection to interstate commerce — any "discernible effect," in the government's words (U.S. Br. 6). The government's view would permit the needed connection to commerce to consist of something not identified in the statute's jurisdictional element. But that would nullify the winnowing function of the

[3] The government suggests that petitioner has waived the argument that the property here was not "used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce" within the meaning of the statute. See U.S. Br. 7 n.2. Not only is that issue intrinsic to the constitutional issue, which was plainly presented in the court of appeals (Pet. C.A. Br. 3), but in pressing that issue petitioner contended that "[i]n the present case there was (and can be) no claim that the affected structure was *used* other than for private-residential purposes" (*id.* at 12) (emphasis added). Where the constitutionality of a statute's application rests on the inclusion of an express jurisdictional element, satisfaction of that jurisdictional element is a prerequisite to a finding of constitutionality. In order to determine whether the statute could be constitutionally applied here, the court of appeals necessarily passed on the question whether the statute applied at all — as this Court would have to do.

jurisdictional element (see *Lopez*, 514 U.S. at 561-562), particularly when effects may be "discern[ed]" so subtly as the government suggests.

As we explained (Pet. 12-15), arson is not an "economic" activity, and to treat it as such would mean that virtually any property crime would fall within the commerce power. Similarly, to construe the commerce power to permit federal regulation of any conduct that has significant economic costs in the aggregate would justify federal regulation of almost any crime. Indeed, the government's analysis would permit Congress to enact nationwide zoning laws, or to make window-breaking a federal crime, based on a jurisdictional element that had no meaningfully limiting effect. This result cannot be reconciled with this Court's clear holding that Congress lacks a "plenary police power." See *Lopez*, 514 U.S. at 566. The government does not grapple with these necessary consequences of its position. But those consequences, which are apparent from Seventh Circuit's decision as well, reinforce the need for prompt further review by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DONALD M. FALK
Counsel of Record
SHARON SWINGLE
Mayer, Brown & Platt
1909 K Street, N.W.
Washington, DC 20006
(202) 263-3000

Counsel for the Petitioner

No. 99-5739

IN THE
SUPREME COURT OF THE UNITED STATES

DEWEY J. JONES, PETITIONER,

v.

UNITED STATES OF AMERICA, RESPONDENT.

CERTIFICATE OF SERVICE

I, Donald M. Falk, counsel for Dewey J. Jones, and a member of the Bar of this Court, hereby certify that on this 19th day of October, 1999, one copy of the Reply Brief for the Petitioner in the above-captioned case was served by first-class mail, postage prepaid, on the following counsel for the United States of America:

Solicitor General of the United States
Room 5614
Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

I further certify that all parties required to be served have been served.

DONALD M. FALK
Mayer, Brown & Platt
1909 K Street, N.W.
Washington, D.C. 20006-1101
(202) 263-3000

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MAYER, BROWN & PLATT
1909 K STREET, N.W.
WASHINGTON, D.C. 20006-1101

SHARON SWINGLE
DIRECT DIAL (202) 263-3284
sswingle@mayerbrown.com

MAIN TELEPHONE
202-263-3000
MAIN FAX
202-263-3300

October 19, 1999

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VIA MESSENGER

The Honorable William K. Suter
Clerk
Supreme Court of the United States
Washington, D.C. 20543

Re: *Dewey J. Jones* v. *United States of America*, No. 99-5739

Dear Mr. Suter:

I am enclosing for filing one original and ten copies of a Reply Brief for the Petitioner in the above-captioned case. Please date stamp the extra copy and return it to the messenger.

Thank you for your consideration of this matter.

Very truly yours,

Sharon Swingle

Enclosures
cc: All Counsel

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No. 99-5739

IN THE SUPREME COURT OF THE UNITED STATES

DEWEY J. JONES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

SUPPLEMENTAL BRIEF FOR THE PETITIONER

DONALD M. FALK
Counsel of Record
SHARON SWINGLE
Mayer, Brown & Platt
1909 K Street, N.W.
Washington, DC 20006
(202) 263-3000

Counsel for the Petitioner

16 pp

TABLE OF AUTHORITIES

Page(s)

Cases

United States v. *Johnson*, __ F.3d __, 1999 WL 988249 (5th Cir. Nov. 1, 1999) . . *passim*

United States v. *Lopez*, 514 U.S. 549 (1995) . . . . . *passim*

Constitutional and Statutory Provisions

U.S. CONST., art. I, § 8 . . . . . *passim*

18 U.S.C. § 844(i) . . . . . *passim*

SUPPLEMENTAL BRIEF FOR THE PETITIONER

Pursuant to Rule 15.8 of the Rules of this Court, petitioner wishes to call this Court's attention to a significant development that has occurred since the filing of petitioner's reply brief. On November 1, a unanimous panel of the United States Court of Appeals for the Fifth Circuit held that 18 U.S.C. § 844(i) could not be applied, consistent with *United States* v. *Lopez*, 514 U.S. 549 (1995), to the arson of a Texas church. See *United States* v. *Johnson*, ___ F.3d ___, 1999 WL 988249 (5th Cir. 1999).[1] The Fifth Circuit's holding conflicts in several respects with the holding of the Seventh Circuit in this case. The deepening of the conflict among the circuits on the constitutional limits of the application of the jurisdictional provision of Section 844(i) should remove any doubt about whether this case warrants prompt review.

1. In *Johnson*, the Fifth Circuit held that a district court had committed plain error in accepting a plea of guilty to a violation of Section 844(i) because there was an inadequate factual basis to establish "an explicit connection or effect on interstate commerce." 1999 WL 988249, at *5. The government had asserted the following connections between the burned church and interstate commerce: (1) an out-of-state insurer paid an $89,000 claim related to the fire; (2) the church contributed 16% of the funds raised from its congregation to a state-wide church conference; (3) the statewide organization forwarded most of its funds to a national church organization; and (4) the national organization distributed those funds throughout the United States and the world. See *id.* at *1. Those connections, we submit,

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[1] For the Court's convenience, we have attached copies of the decision in *Johnson* as an appendix to this supplemental brief.

exceed the connections with interstate commerce shown in this case. See Pet. 2; Pet. App. 2a.

Although the opinion of Judge Benavides was presented as the lead opinion of the court, Judge Barksdale joined Judge Garwood's special concurrence, so that the "concurrence" in fact represents the views of the majority. See 1999 WL 988249, at *6. Judge Garwood's opinion makes clear that the majority of the Fifth Circuit panel decided the case on the ground that "it was plain error for the district court to conclude that the factual basis for the plea reflected a *constitutionally adequate* relation to interstate commerce." *Ibid.* (emphasis added).

In square conflict with the decision of the Seventh Circuit in this case, see Pet. App. 2a-3a, the Fifth Circuit majority maintained that "[a]rsons under section 844(i) are simply not a meaningful 'class of activities' suitable for aggregation." *Johnson*, 1999 WL 988249, at *7. The majority noted that Section 844(i) applies to "all arsons of personal as well as business property" that is "'used . . . in any activity affecting interstate commerce,' which would include, for example, the cowboy's boots." *Ibid.* (quoting 18 U.S.C. § 844(i). Because Section 844(i) "involves no effort to regulate any interstate market nor any related regulatory scheme," the majority concluded that "[a]pplication of the aggregation principle * * * in effect gives Congress the Commerce Clause power to regulate all arsons, a result not supported by the language of the Constitution or the intent of its framers." *Id.* at *8. Such "essentially unlimited aggregation would allow Congress * * * to enact a preemptive national criminal and civil code applicable to all conduct and activity of a purely local nature,"

because "every individual action no matter how local will ultimately have some at least minute interstate [e]ffect, and it will always and inevitably be the case that the aggregation of all such conduct would substantially affect commerce." *Ibid.* (footnote omitted).

The reasoning of the Fifth Circuit majority cannot be reconciled with the self-consciously unlimited aggregation analysis applied by the Seventh Circuit in this case. See Pet. App. 3a. Indeed, Judge Benavides' opinion, while applying an aggregation analysis that superficially resembles that applied by the Seventh Circuit, nonetheless interpreted *Lopez* to require far greater limits on aggregation than the Seventh Circuit imposed. See *Johnson*, 1999 WL 988249, at *4. In Judge Benavides' view, "aggregation" does not "obliterate[], or even circumscribe[] materially, our federal system" precisely because, "[i]n order to aggregate, the government must show that the arson has 'an explicit connection with or effect on interstate commerce.'" *Ibid.* (quoting *Lopez*, 514 U.S. at 562). Judge Benavides read that constitutional requirement to preclude application of the jurisdictional element of Section 844(i) based on a "speculative" or "attenuated" connection to interstate commerce. *Ibid.* That approach — and its recognition of the limiting effect of *Lopez* — conflicts with the Seventh Circuit's application of Section 844(i) to arsons that have only "slight" connections with interstate commerce. Pet. App. 3a.

Judge Benavides recognized that "[a]t most, the impact on interstate commerce" of the church's "filing of a claim and its payment by an out-of-state insurer is speculative." 1999 WL 988249, at *5. Crucially for purposes of the deepening conflict here, Judge Benavides observed that "[t]o find otherwise would be to federalize the arson of any building

* * * insured by an out-of-state company." *Ibid.* The absurdity of that result, while clear to Judge Benavides, escaped the Seventh Circuit in this case. See Pet. App. 2a-3a. Judge Benavides likewise found no substance in the connection with interstate commerce represented by the church's payment of dues that were conveyed to larger, interstate church organizations; that payment, in his view, "does not establish an explicit connection or effect on interstate commerce." *Johnson*, 1999 WL 988249, at *5. But that collection and forwarding of funds vastly exceeded the effects on commerce shown in this case.

2. The Fifth Circuit's decision in *Johnson* undeniably deepens the conflict among the circuits with respect to the constitutional limits on the application of Section 844(i). All members of the *Johnson* panel agreed that Section 844(i) could not be applied to arsons of property that, like the church at issue in *Johnson* and the residence at issue in this case, was not actively used in any commercial activity and lacked substantial, rather than attenuated connections with interstate commerce. That holding cannot be reconciled with the Seventh Circuit's conclusion (Pet. App. 3a) that "a slight connection between the particular arson and interstate commerce" is enough to bring *any* arson within the scope of Section 844(i).

3. The decision in *Johnson* also underscores the need for immediate and plenary review of this case. The constitutional limits on the application of this typical jurisdictional element presents entirely different issues than does the extent of Congress' bare power to proscribe conduct in the absence of such an element, which is at issue in the *Morrison* cases (Nos. 99-5 & 99-29). Whether the mere inclusion of a jurisdictional element essentially nullifies the limits on the commerce power, so as to permit, in Judge Garwood's words, the

enactment of "a preemptive national criminal and civil code" (1999 WL 988249, at *8) is an important and entirely separate issue that warrants this Court's review without delay.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DONALD M. FALK
Counsel of Record
SHARON SWINGLE
Mayer, Brown & Platt
1909 K Street, N.W.
Washington, DC 20006
(202) 263-3000

Counsel for the Petitioner

APPENDIX

UNITED STATES of America, Plaintiff-Appellee,
v.
Robert Earl JOHNSON, Defendant-Appellant.

No. 98-50396.

United States Court of Appeals,
Fifth Circuit.

Nov. 1, 1999.

Linda Frances Thome (argued), Jessica Dunsay Silver, U.S. Dept. of Justice, App. Section, Civil Rights Div., Washington, DC, for Plaintiff-Appellee.

William Jack Browning (argued), Austin, TX, for Defendant-Appellant.

Appeal from the United States District Court for the Western District of Texas.

Before GARWOOD, BARKSDALE and BENAVIDES, Circuit Judges.

BENAVIDES, Circuit Judge:

*1 Robert Earl Johnson ("Johnson") appeals from his criminal conviction for arson, raising an as-applied constitutional challenge to 18 U.S.C. § 844(I). Relying on United States v. Lopez, 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995), he argues that his burning of a Methodist church did not substantially affect interstate commerce and that, as a consequence, there was an insufficient jurisdictional basis for his arson prosecution. Because the district court committed plain error in determining that a sufficient factual basis existed to support Johnson's plea, we vacate his guilty plea and remand for further proceedings.

I

Johnson was indicted for the December 1996 arson of the Hopewell United Methodist Church ("Hopewell") in violation of 18 U.S.C. § 844(I). Following an unsuccessful motion to dismiss, Johnson pleaded guilty. The district court entered judgment and sentenced Johnson to a 115-month term of imprisonment, three years supervised release, and $89,227 restitution.

To support Johnson's plea, the Government offered a written Factual Basis, detailing Johnson's offense. This Factual Basis contained the following information. [FN1] In December 1996, an arson fire destroyed the Hopewell United Methodist Church and its contents. Johnson, who lived next door to the church, admitted that he had set the fire at the church in an effort to cover up past burglaries of Hopewell. Church Mutual Insurance Company, located in Merrill, Wisconsin, insured the church building and its contents. As a result of the fire, Church Mutual Insurance Company paid a claim of over $89,000 to Hopewell. Before the December 1996 blaze, Hopewell was a member of the Texas Annual Conference of the United Methodist Church ("Texas Annual Conference"). As a member church, Hopewell contributed approximately sixteen percent of the money that it collected from its congregation to the Texas Annual Conference. The Texas Annual Conference forwards the majority of its contributions to the United Methodist Church's General Counsel on Finance and Administration in Evanston, Illinois. The General Counsel then distributes these funds to various ministries throughout the world, to the denomination's seminaries, to the Black College Fund, and other efforts across the United States.

II
A

As a general rule, a valid guilty plea waives all non-jurisdictional defects in the proceedings against a defendant. See United States v. Andrade, 83 F.3d 729, 731 (5th Cir.1996) (per curiam). A defendant, however, may preserve a claim for appellate review by entering a conditional plea under Federal Rule of Criminal Procedure 11(a)(2). See United States v. Bell, 966 F.2d 914, 915 (5th Cir.1992). "Failure to designate a particular pretrial issue in the written plea agreement generally forecloses appellate review of that claim." Id. at 916.

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*2 To establish a violation under the arson statute, 18 U.S.C. § 844(I), the government must demonstrate that a person maliciously damaged or destroyed by means of fire a "building, vehicle, or other personal property used in interstate ... commerce or in any activity affecting interstate ... commerce." 18 U.S.C. § 844(I). Section 844(I)'s interstate commerce requirement "while jurisdictional in nature, is merely an element of the offense, not a prerequisite to subject matter jurisdiction." United States v. Rea, 169 F.3d 111, 113 (8th Cir.1999); cf. United States v. Robinson, 119 F.3d 1205, 1212 n. 4 (5th Cir.1997) (explaining that the Hobbs Act's interstate commerce element is not jurisdictional in the sense that "a failure of proof would divest the federal courts of adjudicatory power over the case"). Accordingly, we find that Johnson, in entering an unconditional plea of guilty before the district court, waived his as-applied constitutional challenge to § 844(I). As a consequence, Johnson's appeal can be maintained only if construed as a challenge to the sufficiency of the factual basis for the interstate commerce element of the arson crime to which he pleaded guilty. See United States v. Dayton, 604 F.2d 931, 936-38 (5th Cir.1979) (en banc) (holding that, notwithstanding a guilty plea, a defendant may appeal a district court's finding of a factual basis for the plea on the ground that the facts set forth in the record do not constitute a crime).

B

A trial court cannot enter judgment on a plea of guilty unless it is satisfied that there is a factual basis for the plea. See Fed.R.Crim.P. 11(f). "The purpose underlying this rule is to protect a defendant who may plead with an understanding of the nature of the charge, but 'without realizing that his conduct does not actually fall within the definition of the crime charged.' " United States v. Oberski, 734 F.2d 1030, 1031 (5th Cir.1984) (quoting United States v. Johnson, 546 F.2d 1225, 1226-27 (5th Cir.1977)). This factual basis must appear in the record and must be sufficiently specific to allow the court to determine that the defendant's conduct was "within the ambit of that defined as criminal." Id.

We generally regard a district court's acceptance of a guilty plea as a factual finding to be reviewed under the clearly erroneous standard. See United States v. Rivas, 85 F.3d 193, 194 (5th Cir.1996). Johnson, however, does not contest the findings of fact or other Rule 11 procedures followed by the district court. Instead, he presents a "plain, straightforward issue of law: is the undisputed factual basis sufficient as a matter of law to sustain his plea." United States v. Ulloa, 94 F.3d 949, 955 (5th Cir.1996). Because Johnson did not present this claim to the district court and because his appeal raises an issue of law for which "we need [not] be satisfied that findings of fact regarding the factual basis are not clearly erroneous," we review for plain error. See id. Under the plain error standard, an appellant must show: (1) that there was error; (2) that it was clear and obvious; and (3) that it affected the appellant's substantial rights. See United States v. Olano, 507 U.S. 725, 730-36, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993). Even when these criteria are satisfied, we exercise our discretion to correct only those errors that "seriously affect[ ] the fairness, integrity or public reputation of judicial proceedings." Id. at 732.

C

*3 Johnson argues that the Hopewell United Methodist Church was not a building used in any activity substantially affecting interstate commerce as required by § 844(I). In doing so, he attempts to engraft into individual § 844(I) prosecutions the Lopez requirement that an intrastate activity must substantially affect interstate commerce to be subject to congressional regulation under the Commerce Clause. See Lopez, 514 U.S. 549, 559, 115 S.Ct. 1624, 131 L.Ed.2d 626.

Johnson miscontrues the proper standard to be applied in assessing the sufficiency of the interstate commerce nexus. Johnson's individual act of arson need not have a substantial impact on interstate commerce, so long as arsons of property used in interstate

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commerce or in activities affecting interstate commerce, in the aggregate, substantially impact interstate commerce. See Lopez, 514 U.S. at 561 ("[O]ur cases uphold[ ] regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affect[ ] interstate commerce."); Maryland v. Wirtz, 392 U.S. 183, 196 n. 27, 88 S.Ct. 2017, 20 L.Ed.2d 1020 (1968), overruled on unrelated grounds by, National League of Cities v. Usery, 426 U.S. 833, 854, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976), overruled by, Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 547, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985) ("[W]here a general regulatory statute bears a substantial relation to commerce, the de minimis character of individual instances arising under that statute is of no consequence."). In United States v. Robinson, we considered the constitutionality of the Hobbs Act, 18 U.S.C. § 1951(a), in the wake of the Supreme Court's Lopez decision. We found that the Hobbs Act's enactment was a permissible exercise of the congressional power to regulate commerce among the states. See 119 F.3d at 1208. In reaching this conclusion, we explicitly stated that, "We think Lopez makes clear that legislation concerning an intrastate activity will be upheld if Congress could rationally have concluded that the activity, in isolation or in the aggregate, substantially affects interstate commerce." Id. at 1211-12. Because the substantiality requirement "applies to the class of cases prosecuted in the aggregate[,] in any particular case, proof of a slight effect on interstate commerce suffices." Id. at 1212.

Since Robinson, we have not specifically addressed the question of whether proof of a slight effect on interstate commerce suffices in the context of § 844(I) prosecutions. [FN2] Though in agreement with Judge Garwood's point, in his special concurrence, that Robinson is not binding or this court, the aggregation principle is generally applicable, and the Hobbs Act and § 844(I) are strikingly similar, [FN3] therefore, the reasoning underlying our holding in Robinson applies with equal force to the instant action.

*4 Judge Garwood disagrees with the conclusion that aggregation is here available; in his view, aggregation cannot apply because § 844(I) neither regulates an interstate market or economic activity nor are the individual instances of arson related to each other or any specific regulatory scheme. Aggregation is not so narrowly constrained. Just as the greater power includes the lesser, see 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 511, 116 S.Ct. 1495, 134 L.Ed.2d 711 (1996) ("[W]e do not dispute the proposition that greater powers include lesser ones[.]"); Posadas de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico, 478 U.S. 328, 345, 106 S.Ct. 2968, 92 L.Ed.2d 266 (1986) ("In our view, the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling [.]"), the lesser power here necessarily implies the greater. Judge Garwood concedes that Congress has the power to regulate arsons in a particular economic market, for instance, arsons of abortion clinics; that power can derive only from Congress' more extensive constitutional grant of the power to regulate interstate commerce generally.

"Congress has the power to protect interstate commerce from intolerable or even undesirable burdens." Quill Corp. v. North Dakota, 504 U.S. 298, 318, 112 S.Ct. 1904, 119 L.Ed.2d 91 (1992) (quoting Commonwealth Edison Co. v. Montana, 453 U.S. 609, 637, 101 S.Ct. 2946, 69 L.Ed.2d 884 (1981) (White, J., concurring)); see also United States v. Green, 350 U.S. 415, 420, 76 S.Ct. 522, 100 L.Ed. 494 (1956) (upholding the Hobbs Act because "the legislation is directed at the protection of interstate commerce against injury [.]"); Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 434, 66 S.Ct. 1142, 90 L.Ed. 1342 (1946) ("[The Commerce Clause's] scope enables Congress not only to promote but also to prohibit interstate commerce[.]"). Thus the power of Congress to protect or promote individual markets derives from its power likewise to foster and encourage interstate commerce generally. Section 844(I) is a reflection of Congress' clear intent to protect and promote interstate commerce in general.

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This does not mean, however, that aggregation obliterates, or even circumscribes materially, our federal system. In order to aggregate, the government must show that the arson has "an explicit connection with or effect on interstate commerce." Lopez, 514 U.S. at 562. A "speculative" or "attenuated" connection, however, will not suffice to demonstrate the nexus with interstate commerce. United States v. Collins, 40 F.3d 95, 99, 101 (5th Cir.1994); see also United States v. Corona, 108 F.3d 565, 570 (5th Cir.1997) (rejecting "speculative" effects on interstate commerce as insufficient).

*5 Here, the Government identifies four facts that it contends support a determination that the Hopewell Church was a building used in or affecting interstate commerce or used in any activity affecting interstate commerce: (1) Hopewell's membership in the Texas Annual Conference, to which Hopewell annually contributed funds raised from its members and other sources; (2) the Conference's forwarding of the majority of those funds to the United Methodist Church's national office in Illinois; (3) the national organization's distribution of those funds to various missionary activities, seminaries, and institutions of higher education; and (4) an out-of-state insurer's payment of a claim for more than $89,000 to Hopewell. [FN4] We find that these facts do not provide a sufficiently specific factual basis from which the district court could have determined that Johnson's arson was within the scope of 18 U.S.C. § 844(I). By accepting Johnson's plea without an adequate factual basis, the district court committed plain error.

The Government failed to present to the district court any information clarifying the nature of the relationship between Hopewell and the Texas Annual Conference or between Hopewell and the national United Methodist Church. In particular, the record contains no information from which we can discern that Hopewell was an integral part of a national body with activities explicitly connected to or affecting interstate commerce. Merely being a dues-paying member of an organization that funds a national body does not satisfy § 844(I)'s interstate commerce element. Thus, Hopewell's membership in the Texas Annual Conference does not establish an explicit connection or effect on interstate commerce.

The out-of-state insurer's payment of the $89,000 claim also does not establish the interstate commerce element. Critical to our determination in Robinson that "robberies affecting interstate commerce are precisely the sort of acts 'that might, through repetition elsewhere, substantially affect ... interstate commerce' " was our recognition that the charged robberies in that case had an explicit connection with and effect upon interstate commerce. Robinson, 119 F.3d at 1208 (quoting Lopez, 514 U.S. at 567). We explained that the stores targeted by Robinson and his gang were robbed of thousands of dollars and "that the robberies impaired [the stores'] ability to cash out-of-state checks and to restock goods shipped from other states." Id. at 1215. Unlike the concrete effects of the robberies in Robinson, an out-of-state company's payment of an insurance claim does not amount to an explicit connection or effect on interstate commerce to which the aggregation principle would apply. At most, the impact on interstate commerce of Hopewell's filing of a claim and its payment by an out-of-state insurer is speculative. To find otherwise would be to federalize the arson of any building, vehicle, or other personal property insured by an out-of-state company. Accordingly, we hold that the factual basis presented to the district court does not support a finding that Johnson's December 1996 arson of the Hopewell United Methodist Church resulted in the damage or destruction of a building used in interstate commerce or in any activity affecting interstate commerce.

III

*6 For the aforementioned reasons, we conclude that the district court committed plain error in accepting Johnson's plea of guilty. Because the factual basis presented to the district court fails to establish the interstate commerce element of 18 U.S.C. § 844(I), we exercise our discretion under Olano, 507 U.S. at 732, to vacate Johnson's guilty plea and remand for further proceedings

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consistent with this opinion.

GARWOOD, Circuit Judge, with whom BARKSDALE, Circuit Judge, joins, specially concurring:

Application of 18 U.S.C. § 844(i) continues to trouble this Court. See, e.g., United States v. Corona, 108 F.3d 565, 568-71 (5th Cir.1997); United States v. Nguyen, 117 F.3d 796, 798 and dissenting opinion at 798- 800 (5th Cir.), cert. denied --- U.S. ----, 118 S.Ct. 455, 139 L.Ed.2d 389 (1997).

While I concur in the result here, and agree with Judge Benavides' factual analysis reflecting that it was plain error for the district court to conclude that the factual basis for the plea reflected a constitutionally adequate relation to interstate commerce, I disagree with the aggregation analysis in Judge Benavides' opinion.

In United States v. Lopez, 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995), the Supreme Court set out "three broad categories of activity that Congress may regulate under its commerce power," as follows:

"First, Congress may regulate the use of the channels of interstate commerce.... Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities.... [Third] Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, Jones & Laughlin Steel, 301 U.S. at 37, 57 S.Ct. at 624, i.e., those activities that substantially affect interstate commerce. Wirtz, supra at 196, n. 27, 88 S.Ct. at 2024, n. 27." Lopez at 1629-30.

It is evident that we are here dealing with the third Lopez category, the only category as to which the "substantially affect interstate commerce" requirement and the concept of aggregation are relevant. [FN1]

I agree with the position taken by Judge Higginbotham, joined in by seven other judges of this Court, in United States v. Hickman, 179 F.3d 230 (5th Cir.1999) (en banc; evenly divided court), stating that for purposes of Lopez 's third category:

"... substantial effects upon interstate commerce may not be achieved by aggregating diverse, separate individual instances of intrastate activity where there is no rational basis for finding sufficient connections among them. Of course, Congress may protect, enhance, or restrict some particular interstate economic market, such as those in wheat, credit, minority travel, abortion service, illegal drugs, and the like, and Congress may regulate intrastate activity as part of a broader scheme." Id. at 231.

*7 In Lopez this Court refused to countenance the government's attempt to salvage the Gun Free School Zones Act (18 U.S.C. § 822(q)) by an aggregation argument, viz:

"The government seeks to rely on the rule that '[w]here the class of activities is regulated and that class is within the reach of the federal power, the courts have no power "to excise as trivial, individual instances" of the class.' This theory has generally been applied to the regulation of a class of activities the individual instances of which have an interactive effect, usually because of market or competitive forces, on each other and on interstate commerce. A given local transaction in credit, or use of wheat, because of national market forces, has an effect on the cost of credit or price of wheat nationwide. Some such limiting principles must apply to the 'class of activities' rule, else the reach of the Commerce Clause would be unlimited, for virtually all legislation is 'class based' in some sense of the term." Lopez, 2 F.3d at 1367 (quoting Perez, 402 U.S. at 153-54, 91 S.Ct. at 1361; Wirtz, 392 U.S. at 192-94, 88 S.Ct. at 2022).

The Supreme Court in Lopez likewise rejected the government's aggregation argument, stating, in language fully applicable to section 844(i), as follows:

"Section 922(q) is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be

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undercut unless the intrastate activity were regulated. It cannot, therefore, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce." Id., 115 S.Ct. at 1631 (emphasis added).

In United States v. Bird, 124 F.3d 667 (5th Cir.1997), this Court quoted with approval the above set out passage from our Lopez opinion (124 F.3d at 676-77) and went on to say:

"Unless there is something that relevantly ties the separate incidents and their effects on interstate commerce together, aside from the desire to justify congressional regulation, the government's 'class of activities' interpretation would transform Justice Breyer's Lopez dissent into the constitutional rule." Bird at 677.

Arsons under section 844(i) are simply not a meaningful "class of activities" suitable for aggregation. Section 844(i) is not limited to arsons affecting any particular class of business or any particular national market but extends, without differentiation, to all arsons of personal as well as business property, so long as the property is "used ... in any activity affecting interstate commerce," which would include, for example, the cowboy's boots. To allow such aggregation would necessarily mean that section 844(i) is not any kind of a regulatory scheme of any interstate or national market. The act's focus would be on the crime, arson--not on any effect on interstate commerce. Indeed, although section 844(i) requires that the fire be one which "damages" "property used ... in any activity affecting interstate or foreign commerce," its terms contain no requirement that the fire or the damage to the property have any effect on interstate commerce (or on the activity affecting interstate commerce in which the property is used). Moreover, there is no requirement in section 844(i) that the "activity" be a commercial or economic one. [FN2]

*8 Application of the aggregation principle to this case, which involves no effort to regulate any interstate market nor any related regulatory scheme, in effect gives Congress the Commerce Clause power to regulate all arsons, a result not supported by the language of the Constitution or the intent of its framers. Judge Benavides' approach of essentially unlimited aggregation would allow Congress--wholly apart from any scheme of regulation of any "commerce among the several states,"--to enact a preemptive national criminal and civil code applicable to all conduct and activity of a purely local nature. This is so because every individual action no matter how local will ultimately have some at least minute interstate affect, [FN3] and it will always and inevitably be the case that the aggregration of all such conduct would substantially affect interstate commerce. If Congress has that power then it doubtless also has the "lesser" power to regulate all arsons; but to conclude that Congress has such power is necessarily to conclude that the commerce power is essentially unlimited, contrary to Lopez as well as to the Constitution's basic federal scheme reaffirmed in the Tenth Amendment.

Judge Benavides would slightly soften this blow by holding that instances of local activity may not be aggregated for purposes of the substantial affect requirement of Lopez's third category unless their individual affect on interstate commerce is more than "speculative" or "attenuated," notwithstanding that if aggregated their total interstate affect would be substantial. No explanation is given of why aggregation is improper in such instances-- notwithstanding a substantial affect if aggregated--but nevertheless is proper in instances involving unrelated local noncommercial activities immaterial to any interstate regulatory scheme whose aggregated interstate affect may even be less than the aggregated interstate affect of the instances Judge Benavides would refuse to aggregate. And, if Judge Benavides' approach is more than purely cosmetic and rhetorical, it is in substantial tension with Lopez's recognition of the propriety of aggregation where the challenged rule forms "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be

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undercut unless the intrastate activity were regulated." Id. at 1631. In such a situation, individual activities each of which may be "trivial by itself" or "de minimis," may be aggregated. See Lopez at 1628, 1629. [FN4] It is difficult to see a meaningful difference between affects which are "trivial" or "de minimis " and those which are "speculative" or "attentuated;" and Judge Benavides' opinion affords no assistance in this respect. Finally, Judge Benavides' open-ended aggregation theory, bounded by no principled limits, in substance does away with the substantially affect requirement of Lopez's third category--for if essentially anything and everything can be aggregated then substantiality will always be satisfied. And, it likewise renders wholly meaningless Lopez's special treatment of enactments which form "an essential part of a larger regulation of economic activity, in which the regulatory scheme would be undercut unless the intrastate activities were regulated" as to which the thus regulated intrastate activities are to be "viewed in the aggregate" for purposes of satisfying the third category's substantiality requirement. Id. at 1631.

*9 Section 844(i) is not a regulation of any interstate market or economic activity and the individual instances of arson which it addresses are wholly unrelated to each other or to any particular regulatory scheme or purpose other than the prevention of arson Aggregation is hence improper. [FN5]

I recognize that language in this Court's opinion in United States v. Robinson, 119 F.3d 1205 (1997), supports the position taken by Judge Benavides here. I disagree with that aspect of Robinson, and I would not extend Robinson, a Hobbs Act case, to the instant section 844(i) prosecution. [FN6]

Accordingly, although I concur in the result I am unable to entirely join Judge Benavides' opinion.

FN1. Johnson made no material objection to any of the facts averred therein.

FN2. The pre-Robinson case of United States v. Corona, 108 F.3d 565 (5th Cir.1997), noted that "[t]he consequences of arson are typically local, and we have traditionally left it to the states to determine the appropriate penalty." Id. at 570. Although it suggested that Lopez might call into question earlier cases interpreting § 844(i), Corona did not resolve the question of whether a slight effect on interstate commerce--substantial only in the aggregate--suffices for purposes of the interstate commerce requirement. See id.

However, we also observe that Judge Higginbotham's dissent on behalf of half of the equally divided en banc court in United States v. Hickman, 179 F.3d 230, 242 (5th Cir.1999) argues in dicta that the government could use aggregation-albeit under the dissent's more narrow theory of aggregation-to satisfy the jurisdictional element of a nexus with interstate commerce in typical prosecutions under § 844(i).

FN3. Section 844(i), like the Hobbs Act, contains an explicit interstate commerce requirement.

FN4. In its appellate brief, the Government references several additional facts tending to show an interstate commerce nexus. That information, however, was not part of the factual basis presented by the Government to the district court at the time of Johnson's plea and therefore could not properly be relied upon by the district court in determining whether or not to accept Johnson's guilty plea.

FN1. Appellant was convicted of violating 18 U.S.C. § 844(i) which proscribes arson of "any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce." It is evident that the church building that appellant burned was not "used in interstate or foreign commerce," and on appeal the Government merely argues that "Defendant's arson of the Hopewell United Methodist Church was a crime under Section 844(i) because the Church building was used in an activity affecting interstate commerce" and that the burned church was "a building used in an activity affecting commerce." Judge Benavides' opinion does not suggest that either the first or second Lopez categories are involved or that the church building was "used in interstate or foreign commerce."

FN2. Cf. Lopez at 1633: "We do not doubt that Congress has authority under the Commerce Clause

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to regulate numerous commercial activities that substantially affect interstate commerce and also affect the educational process" (emphasis added). Surely the nation's churches are no more within the reach of the Commerce Clause than its educational processes.

FN3. See, e.g., Lopez, 115 S.Ct. at 1633, quoting approvingly from Justice Cardozo's concurring opinion in A.L.A. Schecter Poultry Corp. v. U.S., 295 U.S. 495, 55 S.Ct. 837, 853, 79 L.Ed. 1570 (1935), " 'A society such as our "is an elastic medium which transmits all tremors throughout its territory; the only question is of their size" '."

FN4. Lopez at 1628 notes that in Wickard v. Filburn, 317 U.S. 111, 63 S.Ct. 82, 87 L.Ed. 122 (1941) "Filburn's own contribution to the demand for wheat may have been trivial by itself," and, at 1631, quotes approvingly from the statement in Maryland v. Wirtz,392 U.S. 183, 88 S.Ct. 2017, 2024 n. 27, 20 L.Ed.2d 1020 (1968), referring to the decision there and in Wickard, that "[t]he Court has said only that where a general regulatory statute bears a substantial relation to commerce, the de minimis character of individual instances arising under that statute is of no consequence" (emphasis supplied by Lopez).

FN5. And, as we observed in Bird, 124 F.3d at 682, n. 15:
"Certainly when Congress is regulating inter state commercial activity, its reason for doing so is immaterial. But where, as here, Congress is regulating purely intra state, noncommercial activity because of its substantial affect on interstate commerce, the purpose must in fact be to regulate interstate commerce. 'Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.' M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421, 4 L.Ed. 579 (1819) (emphasis added). See also id. at 423 ('should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government,' Supreme Court would be bound to hold law invalid)."

FN6. I observe that the terms of the Hobbs Act, 18 U.S.C. § 1951, at least require that the there proscribed robbery be one which "affects [interstate] commerce," while, as I have noted, section 844(i) has no such requirement respecting its proscribed arson of property used in any activity affecting interstate commerce.

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No. 99-5739

Supreme Court, U.S.
FILED
DEC 8 1999
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In the Supreme Court of the United States

DEWEY J. JONES, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

JOINT APPENDIX

DONALD M. FALK
Counsel of Record
SHARON SWINGLE
Mayer, Brown & Platt
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000 (telephone)
(202) 263-3300 (facsimile)

Counsel for the Petitioner

SETH P. WAXMAN
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530
(202) 514-2217 (telephone)
(202) 514-3648 (facsimile)

Counsel for the Respondent

PETITION FOR CERTIORARI FILED AUGUST 13, 1999
CERTIORARI GRANTED NOVEMBER 15, 1999

47 pp

TABLE OF CONTENTS

Page

Relevant Docket Entries 1

Indictment Filed March 25, 1998 2

Memorandum of Decision and Order of the United States District Court for the Northern District of Indiana, Dated May 19, 1998, Denying Defendants' Motions to Dismiss 4

Transcript of Trial Proceedings Before the United States District Court for the Northern District of Indiana, June 17, 1998 8

Transcript of Trial Proceedings Before the United States District Court for the Northern District of Indiana, June 18, 1998 20

Memorandum of Decision and Order of the United States District Court for the Northern District of Indiana, Dated July 27, 1998, Denying Defendant Dewey J. Jones's Motion for Judgment of Acquittal Following Discharge of Jury 23

Judgment of the United States District Court for the Northern District of Indiana, Dated August 26, 1998 29

Decision and Judgment of the United States Court of Appeals for the Seventh Circuit, Dated May 17, 1999 40

Order of the United States Supreme Court Granting Motion for Leave to Proceed In Forma Pauperis and Petition for Writ of Certiorari 45

RELEVANT DOCKET ENTRIES

Feb. 26, 1998	Complaint filed
March 5, 1998	Preliminary hearing and probable cause determination before magistrate judge
March 25, 1998	Indictment filed
May 4, 1998	Motion to dismiss filed by defendant Dewey Jones
May 19, 1998	Order of the district court denying motion to dismiss
June 16-18, 1998	Jury trial
June 18, 1998	Jury finds Dewey Jones guilty as charged in counts one, two, and three of indictment
June 23, 1998	Motion for acquittal filed by defendant Dewey Jones
July 27, 1998	Memorandum and order by the district court denying motion for acquittal
Aug. 26, 1998	Judgment of conviction entered by district court
Sept. 2, 1998	Notice of appeal from judgment of conviction
May 17, 1999	Opinion and judgment by the U.S. Court of Appeals for the Seventh Circuit affirming the judgment
Nov. 15, 1999	Order of the Supreme Court of the United States granting certiorari

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

UNITED STATES	)	**INDICTMENT**
	)	
v.	)	Cause no. 1:98-CR-
	)	
DEWEY J. JONES	)	Violations: 18 U.S.C. §§ 2, 844(i),
JERMAINE M. GIST	)	18 U.S.C. §924(c)
	)	26 U.S.C. §5861(f)

THE GRAND JURY CHARGES:

COUNT ONE

On or about February 23, 1998, in Allen County, Fort Wayne, in the Northern District of Indiana,

DEWEY J. JONES and
JERMAINE M. GIST,

defendants herein, maliciously damaged and destroyed and attempted to damage and destroy, by means of fire and explosive materials, real property, that being the residence of the Walkers, located at 2610 Marcy Lane, Fort Wayne, Indiana, which real property used in interstate commerce and in any activity affecting interstate commerce, and aided and abetted the same,

All in violation of 19 U.S.C. §§ 2, and 844(i).

THE GRAND JURY FURTHER CHARGES:

COUNT TWO

On or about February 23, 1998, in Allen County, Fort Wayne, Indiana, in the Northern District of Indiana,

DEWEY J. JONES and
JERMAINE M. GIST,

defendants herein, knowingly used and carried a firearm to wit: a destructive device, more specifically an incendiary bomb commonly known as a Molotov cocktail, during and in relation to a crime of violence for which they may be prosecuted in a court of the United States, arson in violation of 18 U.S.C. § 844(i), and aided and abetted the same,

All in violation of 18 U.S.C. §§ 2, and 924(c).

THE GRAND JURY FURTHER CHARGES:

COUNT THREE

On or about February 23, 1998 in Allen County, Fort Wayne, in the Northern District of Indiana,

DEWEY J. JONES,

defendant herein, knowingly made a firearm defined under 26 U.S.C. § 5845(a)(8) and (f), to wit: a destructive device, more particularly an incendiary bomb commonly known as a Molotov cocktail, without complying with the requirements under 26 U.S.C. § 5822 for making a firearm,

All in violation of 26 U.S.C. § 5861(f).

A TRUE BILL
/s/ SALLY B. HARROD
Foreperson

JON E. DeGUILIO
United States Attorney
By: /s/ TINA L. NOMMAY
Tina L. Nommay
Assistant United States Attorney
Atty # 06197043
3128 Federal Building
1300 South Harrison Street
Fort Wayne, IN 46802-3489
Telephone: (219) 422-2595
Facsimile: (219) 426-1616

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	1:98-CR-16
	)	
DEWEY J. JONES	)	

MEMORANDUM OF DECISION AND ORDER

This matter is before the Court on defendant Jermaine M. Gist's "Motion to Dismiss" filed April 21, 1998. The government responded to that motion on April 21, 1998. Also before the Court is a "Motion to Dismiss" filed by defendant Dewey J. Jones on May 4, 19898 to which the government responded that same date. For the following reasons, the motions to dismiss will be denied.

On March 25, 1998, a three count indictment was returned in the above-entitled cause. The charges in the indictment stem from the firebombing of a residential home on Marcy Lane in Fort Wayne, Indiana on February 23, 1998. Count one specifically alleges that both defendants "maliciously damaged and destroyed and attempted to damage and destroy by means of fire and explosive material, real property...used in interstate commerce and in any [sic] activity affecting interstate commerce" in violation of 18 U.S.C. § 844(i) and that they aided and abetted in the same in violation of 18 U.S.C. § 2.

Both defendants move to dismiss the indictment charging them "with a violation under the provisions of 18 U.S.C. section 844(i) for the reason that the indictment exceeds the statutory authority of the Government to bring this cause of action and the Court therefor lacks jurisdiction." Their argument is that jurisdiction does not exist under that statute in the case of arson of a private residence that is provided

natural gas obtained from out of state. In making that argument, they recognized that the Seventh Circuit in both *United States v. Stillwell*, 900 F.2d 1104 (7th Cir. 1990) and *United States v. Hicks*, 106 F.3d 187 (7th Cir. 1997) held otherwise but point out that there is contrary authority from other jurisdictions including *United States v. Pappadopoulos*, 64 F.3d 522 (9th Cir. 1995) and *United States v. Denalli*, 73 F.3d 328 (11th Cir. 1996).

Given the precedent in the Seventh Circuit, this Court has no choice but to deny the motion to dismiss. In *Stillwell*, defendant argued that the residence was not "used in interstate or foreign commerce" or "in an activity affecting interstate or foreign commerce" as required by the statute because, as stipulated at trial, "the only nexus between Stillwell's house and interstate commerce was that Northern Illinois Gas Company supplied Stillwell's house with natural gas it obtained from sources outside the State of Illinois." *Stillwell*, 900 F.2d at 1106. Noting that "[t]his court has considered, but left open, the question whether the supply of interstate natural gas alone satisfies the arson statute's commerce requirement," the Seventh Circuit held that it "believe[d] Congress intended § 844(i) to reach a private residence which is supplied with natural gas." *Id.*, at 1107.

Subsequent to *Stillwell*, the United States Supreme Court in *United States v. Lopez*, 115 S.Ct. 1624 (1995) held that the Gun-Free School Zones Act (18 U.S.C. § 922(q)(1)(A)) which made it a federal offense "for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable probable cause to believe is a school zone" exceeded Congress' commerce clause authority since possession of a gun in a local school zone was not economic activity that substantially affected interstate commerce. That case, however, did not implicitly overrule *Stillwell* or similar Seventh Circuit authority such as *United States v. Martin*, 69 F.3d 1422, 1426-28 (7th Cir. 1995) or *United States v. Menzer*, 29 F.3d 1223, 1230 (7th Cir. 1994).

Indeed, in *United States v. Hicks*, 106 F.3d 187 (7th Cir. 1997), defendant argued that *Lopez* did in fact overrule Seventh Circuit decision such as *Menzer* and *Martin* but the Seventh Circuit wrote that "Hicks misunderstands *Lopez*." Although *Hicks* involved the burning of a restaurant which received natural gas from out of state and which had been insured by out of state insurance companies, the Seventh Circuit indicated that its decisional law relating to the federal arson statute and private residences was still valid and was unaffected by *Lopez*.

Recognizing that "several cases decided under the arson statute since *Lopez* reject this approach" (including the Ninth Circuit's decision in *Papadopoulos* and the Eleventh Circuit's decision in *Denalli* relied upon by present defendants), the Seventh Circuit nevertheless wrote:

> The noncommercial character of the torched building strikes us as irrelevant. *The supplying of gas to private homes is a major interstate activity, and its potential disruption by arson is therefore a legitimate matter of federal concern.* If the federal law forbade all arsons, including ones that had not even a slight effect on commerce, the aggregation principle would be inapplicable. X+O is not greater than X. The statute requires proof that the arson with which the defendant is charged have some effect on commerce; only it needn't be a large effect, since the sum of many small effects can be a large effect.

Hicks, supra at 189 (emphasis added). "[T]he activity regulated by the arson statute is the burning of property used in or affecting commerce, and it doesn't take any fancy intellectual footwork to conclude that the aggregate effect of such arsons on commerce is substantial." *Id.*

Given the language in *Hicks* and the predecessor cases in the Seventh Circuit, this Court has no choice to conclude that

where, as here, an arson is alleged to have been committed on a residence which receives natural gas from out-of-state, jurisdiction is proper in this Court under 18 U.S.C. § 844(i). That being the case, the defendants' motions to dismiss must be denied.

Conclusion

On the basis of the foregoing, the "Motion to Dismiss" filed by defendant Jermaine M. Gist on April 21, 1998 is DENIED. Likewise, the "Motion to Dismiss" by defendant Dewey M. Jones filed May 4, 1998 is DENIED.

SO ORDERED this 19th day of May 1998.

/s/ WILLIAM C. LEE
William C. Lee, Chief Judge
United States District Court

[TITLE OMITTED IN PRINTING]

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA

TRANSCRIPT OF TRIAL PROCEEDINGS
HELD JUNE 17, 1998, BEFORE THE HON. WILLIAM C. LEE, UNITED STATES DISTRICT JUDGE

* * * [73] * * *

MS. NOMMAY: The parties have

[74]

stipulated that a Molotov cocktail is a destructive device and that it's an incendiary bomb and it's defined as a firearm under Title 18 United States Code Section 921 and 26 United States Code Section 5845.

Further, the defendants and the Government stipulate that the cause of the fire and the damage to the fire of the house at 2610 Marcy Lane was a Molotov cocktail that had been thrown through the window by Dewey Jones.

* * *

PAMELA SUE WALTERS, called as a Witness herein, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

* * * [75] * * *

Q. How are you employed, Ms. Walters?

A. I'm an insurance adjuster with American Family Insurance.

Q. And where are you employed, what office?

A. For Fort Wayne, Indiana.

Q. Okay. What type of office is that?

A. A claims office.

* * *

Q. Where is American Family's headquarters?

A. Madison, Wisconsin.

* * * [76] * * *

Q. Was a claim on a homeowner's policy paid by American Family for damage done to 2610 Marcy Lane, the home of James and Lisa Walker?

A. Yes.

Q. And actually how is that claim paid, is it a check, a draft, cash?

A. It's a draft.

Q. All right. Can you explain to me [the] significance of a draft?

A. A draft is not guaranteed funds. It is submitted to the insured's bank, and then our bank has to pay their bank the money.

Q. All right. And when you say "our bank", where is your bank?

[77]

A. In Madison, Wisconsin.

* * *

Q. There are offices in the Fort Wayne area where agents sell insurance for American Family; is that correct?

A. That's correct.

Q. And are those agents considered employees of American Family?

A. Yes, they are.

Q. And the claim that you paid on the homeowner's insurance policy, that was for the damage that resulted from 2-23 of '98, is that correct?

A. Yes, that's correct.

* * *

CROSS EXAMINATION

* * *

Q. It's my understanding from the phone book in Fort Wayne, May of 1998 that there are, in fact, 19 agencies in Fort Wayne,

[78]

Indiana?

A. I don't know for certain. There are agencies here in Fort Wayne.

Q. Several?

A. Yes.

Q. Is that the ad for American Family Insurance?

A. Yes, it is.

Q. And that's in Fort Wayne, Indiana?

A. Yes, it is for the agents in Fort Wayne, Indiana.

Q. Okay. Can you count the agents in that Fort Wayne ad?

A. There's 18.

* * * [79] * * *

Q. Going to hand you what's been marked as Defendant's Exhibit A. Does that appear to be something off the web as to American Family Insurance?

A. Yes, it does.

Q. And is that Fort Wayne, Indiana the agents in Fort Wayne, Indiana?

A. Yes, they are.

[80]

Q. Can you count the agents on that web page in Fort Wayne, Indiana?

A. Twenty.

* * *

Q. I hand you what has been marked as Defendant's Exhibit B. Does that appear to be the web page of all the different cities in the State of Indiana where American Family Insurance does business?

A. That I can't tell you. It does look like it's complete, but I can't tell you for certain. I don't know all the cities.

Q. What's your territory in settling claims?

A. Fort Wayne.

Q. Any other areas?

A. No.

Q. Okay. Does this appear to be 108 cities in the State of Indiana listed on that web page?

A. Approximately.

Q. Okay. Would it be fair to say that American Family Insurance does extensive

[81]

business within the State of Indiana?

A. Based on that information, it appears so.

Q. Okay. What's the name of the bank that this claim check was written off?

A. I don't know.

Q. So that bank could also do business in the State of Indiana?

A. I don't know.

* * * [82] * * *

ANTHONY LEE WEST, called as a Witness herein, having been first duly sworn, was examined and testified as follows;

DIRECT EXAMINATION

* * *

Q. Hour you employed, sir?

A. I work for Midland Mortgage Company.

Q. Where is that company located?

A. Oklahoma City, Oklahoma.

Q. Is that the headquarters of the company?

A. It is.

Q. Any offices here in Indiana?

A. No.

Q. What types of things does your company, Midland Mortgage, do?

A. We service mortgage loans.

Q. Which department are you assigned to at Midland Mortgage?

[83]

A. I'm the supervisor of the Hazard Insurance Department.

* * *

Q. Okay. Can you tell me about that Hazardous Insurance Department and the things that you do there?

A. Okay, we're just simply, we make the payments to the insurance companies as renewal periods come up for all of our mortgage loans.

Q. And the payments that you make, the insurance premiums, where do those — where does that money come from?

A. It comes from the payments, the mortgagers make.

Q. Are you familiar with the address 2610 Marcy Lane or the names James and Lisa Walker?

A. Yes, I am.

Q. What can you tell me about that property at

[84]

2610 Marcy Lane?

A. I just received a call from the Walkers stating their property had burned, and that their insurance company originally was not going to cover it and that's when I got involved when the insurance company was not going to cover it.

Q. Okay. So you got the insurance company to cover it because you had paid the premium; is that correct?

A. Correct.

Q. And the premium comes from Oklahoma City, correct?

A. Correct.

Q. And I take it that must mean, then, that Midland Mortgage Company has a mortgage on the residence at 2610 Marcy Lane?

A. Yes, we do.

Q. So then insurance premiums were paid by your department to American Family Insurance Company for coverage that included the fire on February 23rd of 1998?

A. It was taken to the agent of American Family.

* * * [85] * * *

CROSS EXAMINATION

* * *

Q. First of all, this — this mortgage that you hold, is that the original mortgage or was that brokered out?

A. The original mortgage is written and then assigned out. We were assigned the mortgage by City Corp. Mortgage.

* * *

Q. Okay. And you didn't buy this insurance

[86]

policy, the Walkers in their monthly payment paid for this insurance policy?

A. Correct.

Q. And just protect yourself, or to make sure the insurance is on the property, you just forward it onto American General, right?

A. Right.

Q. Or American Family Insurance here in Fort Wayne?

A. Right.

Q. Okay. And so you suffered no loss in this fire at all?

A. No.

* * * [87] * * *

RAY VUKAS, called as a Witness herein, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

* * *

Q. Mr. Vukas, how are you employed?

A. I'm employed by Nipsco as a security investigations functions.

Q. What does Nipsco stand for?

A. Northern Indiana Public Service Company.

* * *

Q. Is it your company's practice to maintain records of all the residents that receive natural gas from Nipsco?

A. Yes, we do.

[88] * * *

Q. All right. Did you cause a search to be done on your records to determine if the residence at 2610 Marcy Lane in Fort Wayne, Indiana was receiving Nipsco natural gas on 2-23 of 1998?

A. Yes, I did.

Q. And what did you find, according to your records?

A. According to our records, that address, has Nipsco Gas service.

Q. On 2-23 of 1998?

A. Yes.

* * * *

[90] * * *

CECILIA LARGURA, called as a Witness herein, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

[91] * * *

Q. And Ms. Largura, how are you employed?

A. I'm employed by Nipsco Industries Management Services, Corporate Gas Supply.

* * *

Q. All right. If you were in the gas supply department, can you tell me where it is Nipsco gets its supply of natural gas?

A. Nipsco gets its supply of natural gas through field areas or field zones. The majority in south Texas, Louisiana, the Permian (phonetic) Basin, the Rocky Mountains, Canadian supply and the mid-Continent basin. We transport those supplies to our Northern Indiana territory.

Q. So natural gas is not coming from Indiana?

A. It's not produced in Indiana, that's correct.

* * * *

[111]

LISA WALKER, called as a Witness herein, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

* * *

Q. On 2-23 of this year, where were you living?

A. At Marcy Lane, 2610 Marcy Lane.

Q. Is that a house or an apartment?

A. A house.

Q. Who lived there with you?

A. My husband, and his three children.

Q. Where you renting or did you own this home?

A. Um —

Q. Was there a mortgage on your house?

A. Yes.

Q. Was the mortgage on your house on 2-23,

[112]

'98?

A. Yes.

Q. Whose your mortgage company?

A. Midland Mortgage Company.

Q. Do you make monthly payments to them?

A. Yes.

Q. Where do you send those monthly payments?

A. Oklahoma City.

Q. Did you submit a claim to your insurance company for fire loss?

A. Yes.

Q. Did they, in fact, pay that claim?

A. Yes.

Q. Is that American Family Insurance Company?

A. Yes.

Q. On 2-23, did your residence have gas appliances or gas heat?

A. Yes.

Q. And on 2-23, did your Nipsco or did your residence receive gas from Nipsco?

A. Yes.

* * * *

[184] * * *

MR. ARATA: And my objection is to the Court's Instruction Number 19, which is the definition of interstate commerce. Especially, it's as to the second sentence which reads, quote, "to show that real property was used in activity affecting interstate commerce, the government need only establish a minimal connecton between the real property at issue and some aspect of interstate commerce."

I believe that's a misstatement of the law. It changes the burden of proof of the Government from which should be proof beyond a reasonable doubt. Also interstate commerce is an element of the offense and that is shown in instruction number 16 which specifically requires in paragraph 4 that the real property used in interstate or foreign commerce or any other

[185]

activity affecting interstate or foreign commerce, period. Being an element, the Government must prove that beyond a reasonable doubt and as it's now written, that is no longer required.

Case law has held that the word — that a defendant could not insert the word substantially affected interstate commerce, but I have never seen a case that allows the Government to insert the word minimally affected interstate commerce.

To the contrary, my understanding of the case that's cited is that is just — the Government must show some sort of minimal connection with interstate commerce for the Govern-

ment to have any jurisdiction in this matter and the authority to legislate in such areas. However, again, proof of this element is required to be proven beyond a reasonable doubt. My proposal would be either to delete the entire instruction or delete the second sentence of that instruction. That's it.

* * * *

[TITLE OMITTED IN PRINTING]

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA

TRANSCRIPT OF TRIAL PROCEEDINGS
HELD JUNE 18, 1998, BEFORE THE HON. WILLIAM C. LEE, UNITED STATES DISTRICT JUDGE

[2] * * *

THE COURT: Good morning. * * * The only substantial objection was by the defendant to the Court's proposed number 19 is now 17. That is the instruction that defines interstate commerce, and instructs the jury on what the Government needs to prove to satisfy that element of the offense. This is the same instruction, which was used in United States versus Wing, 104 Fed.3d 986 at page 991, Seventh Circuit, 1997. The use of that instruction was held not to be error in that case, although

[3]

there was more than — more in that case than regarding the interstate commerce, i.e., it was a restaurant. Nevertheless, Seventh Circuit approval of that instruction is a correct statement of law in light of its earlier addition, United States versus Martin, 63 F.3d 1422, Seventh Circuit 1995, which held there need only be a de minimis connection to interstate commerce is still good law in the Seventh Circuit and that's what I'm going to follow.

So I'm going to overrule that objection, and that instruction stays in. It is now number 17 in the Court's final instructions. So I have the new instructions for you.

* * * [30] * * *

JURY INSTRUCTIONS READ

THE COURT: Members of the jury: The evidence and arguments in this case have been completed and I will now instruct you as to the law applicable to this case.

* * * *

[35] * * *

In Count One, the defendant is charged with violating 18 U.S.C. Section 844(I), which provides in pertinent part, whoever maliciously

[36]

damages or destroys or attempts to damage or destroy by means of fire or any explosive, any building, vehicle or other real or personal property, used in interstate commerce, used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce commits an offense against the United States.

* * * To sustain a charge of arson in violation of 18 U.S.C. Section 844(I0, contained in Count One of the indictment, the government must prove the following proposition: One, the defendant

[37]

maliciously, two, damaged or destroyed or attempted to damage or destroy, three, by means of fire or an explosive, four, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty on Count One. If, on the other hand you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty on Count One.

The terms maliciously as used in Section 844(I) means the defendant acted intentionally or with wilful disregard or the likelihood that damage or injury would result from his acts.

The term interstate commerce means travel, trade, traffic, commerce, transportation, or communication among several states. To show that real property was used in activity affecting interstate commerce, the government

[38]

need only establish a minimal connection between the real property at issue and some aspect of interstate commerce.

* * * *

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	1:98-CR-16
	)	
DEWEY J. JONES	)	

MEMORANDUM OF DECISION AND ORDER

This matter is before the Court on defendant Dewey J. Jones' "Motion for Judgment of Acquittal Following Discharge of Jury" filed June 23, 1998. The government responded to that motion on June 26, 1998. For the following reasons, the motion will be denied.

Discussion

On March 25, 1998, a three count indictment was returned in the above-entitled cause. The charges in the indictment stem from the firebombing of a residential home on Marcy Lane in Fort Wayne, Indiana on February 23, 1998. Count 1 specifically alleged that defendants Dewey J. Jones and Jermaine M. Gist "maliciously damaged and destroyed and attempted to damage and destroy by means of fire and explosive material, real property . . . used in interstate commerce and in any [sic] activity affecting interstate commerce" in violation of 18 U.S.C. § 844(i) and that they aided and abetted in the same in violation of 18 U.S.C. § 2. Count 2 alleged that both defendants knowingly used or carried a firearm during and in relation to a crime of violence, also in violation of the above statutes. Count 3 alleged that defendant Jones knowingly made a firearm without complying with federal requirements in violation of 28 U.S.C. § 5861(f).

Defendants were tried before a jury commencing on June 17, 1998. At the close of the government's case, this Court entered a judgment of acquittal in favor of defendant Gist. On June 17, 1998, the jury returned a verdicts of guilty on all counts with respect to defendant Jones.[1]

The present motion is directed towards counts one and two. It is defendant's position that the government failed to establish that the real property was used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce and hence the government failed to prove an essential element for both of those counts.[2]

A motion for acquittal may not be granted if, viewing the evidence in the light most favorable to the prosecution, there is relevant evidence from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt. *United States. v Reed*, 875 F.2d 107, 111 (7th Cir. 1989); *United States v. Pope*, 739 F.2d 289, 291 (7th Cir. 1984). In applying this standard, it is incumbent upon the court to recognize that it is the jury which has the exclusive authority to assess the witnesses' credibility, resolve evidentiary conflicts and draw reasonable inferences from the evidence presented. *Reed, supra* at 111. "The test that the court must use is whether at the time of the motion there was relevant evidence from which the jury could reasonably find [the defendants] guilty beyond a reasonable doubt." *United States v. Weed*, 689 F.2d 752 (7th Cir. 1982).

The government's evidence at trial tended establish an interstate connection based upon three things: natural gas

---

[1] Since defendant Jones is the only defendant remaining, hereinafter he will be referred to simply as defendant.

[2] A similar argument was raised by both defendants in motions to dismiss. This Court denied those motions by order dated May 19, 1998.

being supplied to the residence at 2610 Marcy Lane; an insurance claim which was paid by an out-of-state insurer; and mortgage payments which were being paid out-of-state. Briefly, the evidence was as follows:

> →Northern Indiana Public Service Company (NIPSCO) supplied natural gas to the residence on the date of the firebombing. NIPSCO gets its gas from outside of Indiana, generally from Texas or Louisiana or Canadian provinces.
>
> →Midland Mortgage Company had a mortgage on the residence. Monthly mortgage payments were made to Midland in Oklahoma City, Oklahoma. From those payments, insurance premiums were paid annually to American Family Insurance in Indiana.
>
> →American Family Insurance had homeowner's insurance coverage on the house. Its home office is in Madison, Wisconsin and drafts for claims made on the policy (one was made here) are paid via the company's bank in Madison.

It is the government's position that such evidence adequately provided the interstate commerce connection.

In his motion for judgment of acquittal, defendant asserts that the damaged real estate, a private residence, was not shown to have been a part of interstate commerce. With respect to each of the connections sought to be established by the government, the defendant argues:

> "Two representatives from NIPSCO Industries, the parent corporation, testified that this private residence received natural gas from NIPSCO, a subsidiary doing business in Indiana. Both NIPSCO corporations are Indiana Corporations and regulated by the Indiana Regulatory Commission. However, no one from NIPSCO testified that the intrastate services received from NIPSCO Industries or NIPSCO, Inc. were affected

in any way as a result of this fire. No one testified that the natural gas lines were damaged in any manner. No one testified that the natural gas services were even turned off as a result of this fire. Finally, no one from NIPSCO testified that they even lost any business whatsoever as a result of this fire.

"As to the Mortgage holder, Midland Mortgage Company, its representative testified that it suffered no loss as a result of this fire. Further, no one, including the Midland Mortgage representative, testified that Midland Mortgage was affected in any manner.

"As to American Family Insurance, the insurance company has 18 to 20 agents in Fort Wayne, Indiana. The insurance company has its own 'Claims office' in Fort Wayne which handled the claim as a result of this fire. While the claims agent testified that the settlement 'draft' was written by its out of state bank, the agent did not even know the name of the bank. Further, the agent admitted that this bank may in fact do business in Indiana. No copy of the draft was admitted into evidence. no copy of the canceled check allegedly used to pay this claim was ever introduced into evidence. No evidence was introduced as to where the Walker's did their own banking. For all we know, this was an 'intra-bank' transaction occurring in Fort Wayne, Indiana, with a Fort Wayne, Indiana bank.

(Rec. 59, pp 4-5).

While defendant has raised interesting arguments with respect to the amount of evidence required to prove the interstate commerce nexus, this Court is of the view that prevailing Seventh Circuit law establishes that the evidence offered here is sufficient to support the conviction. Indeed, the natural gas connection alone suffices to supply the interstate commerce element.

In *United States v. Stillwell*, 900 F.2d 1104 (7th Cir. 1990), defendant argued that the residence he was accused of torching was not "used in interstate or foreign commerce" or "in an activity affecting interstate or foreign commerce" as required by the statute because, as stipulated at trial, "the only nexus between Stillwell's house and interstate commerce was that Northern Illinois Gas Company supplied Stillwell's house with natural gas it obtained from sources outside the State of Illinois." *Stillwell*, 900 F.2d at 1106. Noting that "[t]his court has considered, but left open, the question whether the supply of interstate natural gas alone satisfies the arson statute's commerce requirement," the Seventh Circuit field that it "believe[d] Congress intended § 844(i) to reach a private residence which is supplied with natural gas." *Id.*, at 1107.

Later, in *United States v. Hicks*, 106 F.3d 187 (7th Cir. 1997), a case involving the burning of a restaurant that received natural gas, the Seventh Circuit reaffirmed its view of just how far the statute reaches. The court wrote that "the noncommercial character of the torched building strikes us as irrelevant" and that "the supplying of gas to private homes is a major interstate activity, and its potential disruption by arson is therefore a legitimate matter of federal concern." *Id.* at 189. The court also wrote:

> The jury question is whether the transaction in issue involved or affected commerce; for that is the commerce element in the statute, as distinct from the constitutional precondition to the statute's being valid. Because the arson statute was intended to exert Congress's full power under the commerce clause to prevent arson . . . all the jury in our case had to find was a slight effect on interstate commerce, since, as we have explained, that is all that is necessary to bring the aggregation principle into play. The judge instructed the jury that 'the government need only establish a minimal connection between the property at issue and some aspect of interstate

commerce.' That is correct. And the burden that this formulation places on the Government was carried.

Id. at 190.

Given the holding in *Stillwell* and the language in *Hicks*, it is clear that the motion for judgment of acquittal must be denied. While defendant makes an interesting argument that the evidence did not show any harm to the natural gas supplier, it would not appear that that is required under present Seventh Circuit case law.

Conclusion

On the basis of the foregoing, defendant Dewey J. Jones' "Motion for Judgment of Acquittal Following Discharge of Jury" filed June 23, 1998 is DENIED.

SO ORDERED this 27th day of July 1998.

/S/ WILLIAM C. LEE
William C. Lee, Chief Judge
United States District Court

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

UNITED STATES OF AMERICA,	JUDGMENT IN A CRIMINAL CASE
V.	CASE NUMBER: 1:98-CR-16
DEWEY J. JONES	PATRICK J. ARATA 219/424-1010 DEFENDANT'S ATTORNEY

The Defendant:

( ) pleaded guilty to count(s) _____.

( ) pleaded nolo contendre to count(s) _____ which was accepted by the court.

(X) was found guilty on counts 1, 2 and 3 after a plea of not guilty.

Title & Section	*Nature of Offense*	*Date Offense Concluded*	*Count Number(s)*
18:844(I); 18:2	Damage/Destruction by means of fire and explosive devices, real property used in interstate commerce; aiding & abetting	2/26/98	1
18:924(c); 18:2	Use of Molotov Cocktail during crime of violence; aiding & abetting	2/26/98	2
26:5861(f)	Unlawful making a firearm (Molotov cocktail)	2/26/98	3

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

( ) The defendant has been found not guilty on count(s) .
( ) Count(s) ___ (is)(are) dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

DEFENDANT'S SOC. SEC. NO.: 365-84-1943

DEFENDANT'S DATE OF BIRTH: 12/13172

DEFENDANT'S USM NO.: 05411-027

DEFENDANT'S MAILING ADDRESS:

18150 PARTON STREET
DETROIT, MICHIGAN 48219

AUGUST 26, 1998
DATE OF IMPOSITION OF SENTENCE

/s/ WILLIAM C. LEE
SIGNATURE OF JUDICIAL OFFICER

WILLIAM C. LEE, CHIEF JUDGE
NAME & TITLE OF JUDICIAL OFFICER

DEFENDANT'S RESIDENCE ADDRESS:

DEFENDANT INCARCERATED

AUGUST 26, 1998
DATE

DEFENDANT: DEWEY J. JONES JUDGMENT – PAGE 2 OF 7
CASE NUMBER: 1:98-CR-16-1

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of four hundred twenty (420) months, consisting of sixty (60) months on Count 1, forty-six (46) months on count 3, to

run concurrently, and three hundred sixty (360) months on Count 2, to run consecutively to counts 1 and 3.

( ) The court makes the following recommendations to the Bureau of Prisons:

(X) The defendant is remanded to the custody of the United States Marshal.

( ) The defendant shall surrender to the United States Marshal for this district:

( ) at _____ a.m./p.m. on _____.

( ) as notified by the United States Marshal.

( ) The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.

( ) before 2 p.m. on _____.

( ) as notified by the United States Marshal.

( ) as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

BY _____
DEPUTY MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of five (5) years on Count 2 and three (3) years on each of counts 1 and 3, all such terms to run concurrently.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime. The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to or * * * drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

( ) The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse.

(X) The defendant shall not possess a firearm as defined in 18 U.S.C. § 921.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The

defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on probation or supervised release pursuant to this Judgment, the defendant shall not commit another federal, state or local crime. In addition:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling training, or other acceptable reasons;

6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

ADDITIONAL CONDITIONS OF SUPERVISION

The defendant shall participate, under a co-payment plan, in a drug aftercare treatment program which may include urine testing at the direction and discretion of the probation officer. As part of the co-payment program, the defendant will be held responsible for 3% per $100.00 of his net wages as determined by the probation office. If the defendant is unemployed or receiving public assistance, the defendant will be held responsible for a co-payment of $10.00 per month. Payments are to be made on a per visit basis.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule payments set forth in Sheet 5, Part B.

Count	Assessment	Fine	Restitution
1	$100.00	waived	$77,386.87
2	$100.00	waived	
3	$100.00	waived	

( ) If applicable, restitution amount ordered pursuant to plea agreement $_____

Totals:	$300.00	$waived	$77,386.87

FINE

The above fine includes costs of incarceration and/or supervision in the amount of $_____.

The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid I full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for default an delinquency pursuant to 18 U.S.C. § 3612(g).

( ) The court has determined that the defendant does not have the ability to pay interest and it is ordered that:

( ) The interest requirement is waived.

( ) The interest requirement is modified as follows:

RESTITUTION

( ) The determination of restitution is deferred in a case brought under Chapters 109A, 110, 110A, and 113A of Title 18 for offense committed on or after 09/13/1994,

until _____. An Amended Judgment in a Criminal Case will be entered after such determination.

( ) The defendant shall make restitution to the following payees in the amounts listed below.

If the defendant makes a payment, each payee shall received an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below.

Name of Payee	*Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage Payment
American Family Ins.	$77,386.87	$77,386.87	
Totals	$77,396.87	$77,386,87	$

* Findings for the total of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committee on or after September 13, 1994.

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal penalties shall be due as follows:

A (X) ASSESSMENT in full immediately; or

B (X) RESTITUTION payments shall be made from any wages the defendant may earn in prison in accordance with the Bureau of Prisons' Inmate Financial Responsibility Program. Any portion of the restitution that is not paid in full at the time of the defendant's release from imprisonment shall become a condition of supervision.

C ( ) no later than _____; or

D ( ) in installments to commence _____ days after the date of this judgment. In the event the entire amount of criminal monetary penalties imposed is not paid to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due, and shall request the court to establish a payment schedule if appropriate; or

E ( ) in _____ (e.g., equal, weekly, monthly, quarterly) installments of $_____ over a period of _____ year(s) to commence _____ days after the date of this judgement.

The National Fine Center will credit the defendant for all payment previously made toward any criminal monetary penalties imposed.

Special instructions regarding the payment of criminal monetary penalties:

( ) The defendant shall pay the costs of prosecution.

( ) The defendant shall forfeit the defendant's interest in the following property to the United States:

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment.

DEFENDANT: DEWEY J. JONES JUDGMENT – PAGE 7 OF 7
CASE NUMBER: 1:98-CR-16-1

STATEMENT OF REASONS

(X) The court adopts the factual findings and guideline application in the presentence report.

OR

( ) The court adopts the factual findings and guideline application int he presentence report except (see attachment, if necessary):

Guideline Range Determined by the Court

Total Offense Level: 21

Criminal History Category: III

Imprisonment Range: 46 to 57 months on each of counts 1 and 3 (mandatory minimum 60 months on count 1, by statute)

30 years statutory mandatory minimum on Count 2

Supervised Release Range: 3 to 5 years

Fine Range: $7,500 to $75,000

(x) Fine waived or below the guideline range because of inability to pay.

Total Amount of Restitutions: $77,386.87

( ) Restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims, pursuant to 18 U.S.C. § 3663(d).

( ) For offenses that require the total amount of loss to be stated, pursuant to Chapters 109A, 110, 110A, and 113A of Title 18 restitution if not ordered

because the economic circumstances of the defendant do not allow for the payment of any amount of a restitution order, and do not allow for the payment of any or some portion of a restitution order in the foreseeable future under any reasonable schedule of payments.

( ) Partial restitution is ordered for the following reason(s):

(X) The sentence is within the guidelines range, that range does not exceed 24 months, and the court finds not reason to depart from the sentence called for by the application of the guidelines.

OR

( ) The sentence is within the guideline range, that range exceed 24 months, and the sentence is imposed for the following reason(s)

OR

( ) The sentence departs from the guideline range:

( ) upon motion of the government, as a result of defendant's substantial assistance.

( ) for the following specific reason(s):

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

v.

DEWEY J. JONES, DEFENDANT-APPELLANT.

No. 98-3255.

UNITED STATES COURT OF APPEALS,
SEVENTH CIRCUIT.

ARGUED APRIL 27, 1999.
DECIDED MAY 17, 1999.

David H. Miller (argued), Tina L. Nommay, Office of the United States Attorney, Fort Wayne, IN, for Plaintiff-Appellee.

Richard H. Morgan (argued), Pontiac, MI, for Defendant-Appellant.

Before ESCHBACH, EASTERBROOK, and DIANE P. WOOD, Circuit Judges.

EASTERBROOK, Circuit Judge.

Dewey Jones tossed a Molotov cocktail into his cousin's living room; fire severely damaged the home. A jury convicted Jones of arson, 18 U.S.C. § 844(i), making an illegal destructive device (the firebomb), 26 U.S.C. § 5861(f), and using a destructive device during and in relation to a crime of violence (the arson), 18 U.S.C. § 924(c). His appeal challenges only one of these three convictions. Jones contends that § 844(i) exceeds Congress's power under the Commerce Clause (Art. I § 8 cl. 3) when applied to the destruction of a residence rather than a commercial establishment.

This is a tough row to hoe, and not only because the court has rejected the argument before. *United States v. Stillwell*, 900 F.2d 1104 (7th Cir.1990). Section 844(i) requires proof that the torched property was "used in inter-

state or foreign commerce or in any activity affecting interstate or foreign commerce". If this is proved, then an adequate connection to interstate commerce is established. So the eighth circuit held in *United States v. Rea*, 169 F.3d 1111 (8th Cir.1999), and *United States v. Flaherty*, 76 F.3d 967, 973-74 (8th Cir.1996), in the course of declaring *United States v. Lopez*, 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995), irrelevant to prosecutions under § 844(i). But it is difficult to dispatch the constitutional objection quite this easily. *Lopez* says that the power of Congress is limited to activities that substantially affect commerce, 514 U.S. at 559, 115 S.Ct. 1624, while proof of a small effect will satisfy the statute. In this case the jury was entitled to conclude that the owner of the residence purchased natural gas in interstate commerce, secured a mortgage from an out-of-state lender, and received an insurance check from an out-of-state insurer. Purchases of gas would diminish while reconstruction occurred, and perhaps the arson would affect repayment of the loan. But these interstate connections are pretty slight for a single building; they don't establish a "substantial" connection between this arson (or this residence) and interstate commerce. So the jury's finding is not necessarily sufficient; and the fact that *Lopez* post-dates *Stillwell* means that we cannot rest content with a citation to that case.

Two circuits have distinguished between commercial and residential property and held that the national government lacks the constitutional authority to punish arsons of residences. Compare *United States v. Serang*, 156 F.3d 910 (9th Cir.1998) (commercial), with *United States v. Pappadopoulos*, 64 F.3d 522 (9th Cir.1995) (residential); compare *United States v. Grimes*, 142 F.3d 1342 (11th Cir.1998) (commercial), with *United States v. Denalli*, 73 F.3d 328 (11th Cir.) (residential), modified on other grounds, 90 F.3d 444 (1996). Jones wants us to follow these decisions. A prior decision declining to do so, *United States v. Hicks*, 106 F.3d 187 (7th Cir. 1997), involved a commercial establish-

ment; our statement that there is no constitutional line between commercial and residential property was dictum, Jones insists.

No, it was not dictum. *Hicks* analyzed the scope of national power under the commerce clause and observed that, after *Lopez*, any activity that substantially affects commerce may be regulated. Although living in one's own house is not commerce, the residential housing industry is interstate in character. Goods and materials for housing move across state borders; gas and electricity likewise; the financial and insurance markets that provide loans and spread risks have national if not international scope; arson can substantially affect all of these. This was the background for our statement that "[t]he noncommercial character of the torched building strikes us as irrelevant. The supplying of gas to private homes is a major interstate activity, and its potential disruption by arson is therefore a legitimate matter of federal concern . . . . The statute requires proof that the arson with which the defendant is charged have some effect on commerce; only it needn't be a large effect, since the sum of many small effects can be a large effect. . . . Categories such as private residence and rental apartment building do not appear in the commerce clause or the arson statute; nor is there anywhere else in the law to look for guidance as to how finely to categorize the types of property that might be damaged or destroyed by arson. Categorize finely enough and the interstate effects evaporate and the statute is nullified." 106 F.3d at 189-90. This was why the defendant in *Hicks* was wrong to argue that a substantial effect on commerce had to be established from his particular arson; or from arsons of commercial buildings in Portage, Wisconsin; or from arsons of commercial buildings generally. "Arsons of buildings" substantially affect interstate commerce; that holding of *Hicks* applies to Jones's arson of a residential structure in Indiana just as it applied to Hicks's arson of a commercial structure in Wisconsin.

None of the arguments offered in this case, or by *Pappadopoulos* or *Denalli*, persuades us that *Hicks* or *Stillwell* is wrong. Cases such as *McLain v. Real Estate Board of New Orleans, Inc.*, 444 U.S. 232, 100 S.Ct. 502, 62 L.Ed.2d 441 (1980), conclude that residential property in the aggregate substantially affects interstate commerce. *McLain* holds that an agreement among a few brokers to fix commissions on sales of residential property in New Orleans thus is within the commerce power. See also, *e.g.*, *Goldfarb v. Virginia*, 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975) (attorneys' agreement on fees for residential real estate title searches is within commerce power); *Summit Health, Ltd. v. Pinhas*, 500 U.S. 322, 111 S.Ct. 1842, 114 L.Ed.2d 366 (1991) (exclusion of a single physician from one hospital is within the commerce power because the provision of health care in the aggregate significantly affects commerce).

If instead of asking whether "residential real estate" substantially affects commerce we ask whether "arson of buildings" or even "arson of residences" substantially affects commerce, the answer still must be yes. According to the Federal Bureau of Investigation, there were 69,269 reported arsons in 1997, the most recent year for which complete data are available. *Uniform Crime Reports 1997* Table 2.32 (1998). Of these arsons, 33,848 involved buildings; and 19,888 of the buildings were residential (13,692 single-family dwellings and 6,196 multi-family residences). The damage was a little more than $14,000 per residential arson. *Id.* at Table 2.34. That's a total of approximately $280 million lost to residential arsons in 1997 alone. If even a small fraction of the loss is covered by interstate insurance markets, the effect is "substantial." Most of these arsons also affected gas, electric, and telephone service, required the occupants to stay at hotels while repairs were completed (a sure sign of interstate commerce, see *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 85 S.Ct. 348, 13 L.Ed.2d 258 (1964)), led friends and loved ones to travel from other states

to give comfort to the victims, and so on. This collective effect, plus proof of a slight connection between the particular arson and interstate commerce, permits the national government to establish substantive rules of conduct.

AFFIRMED.

Supreme Court of the United States

No. 99-5739

Dewey J. Jones,
Petitioner

v.

United States

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Seventh Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted limited to the following question: Whether, in light of United States v. Lopez, 514 U.S. 549 (1995), and the interpretive rule that constitutionally doubtful constructions should be avoided, see DeBartolo Corp. v. Florida Gulf Coast Trades Council, 485 U.S. 568, 575 (1988), Section 844(i) applies to the arson of a private residence; and if so, whether its application to the private residence in the present case is constitutional.

November 15, 1999

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No. 99-5739

Supreme Court, U.S.
FILED
DEC 30 1999
CLERK

In the Supreme Court of the United States

DEWEY J. JONES, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR THE PETITIONER

DONALD M. FALK
Counsel of Record
SHARON SWINGLE
Mayer, Brown & Platt
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000

Counsel for the Petitioner

65pp

QUESTION PRESENTED

Section 844(i), 18 U.S.C., prohibits the arson or attempted arson of property "used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce." The question presented is whether, in light of *United States* v. *Lopez*, 514 U.S. 549 (1995), and the interpretive rule that constitutionally doubtful constructions should be avoided, see *DeBartolo Corp.* v. *Florida Gulf Coast Trades Council*, 485 U.S. 568, 575 (1988), Section 844(i) applies to the arson of a private residence; and if so, whether its application to the private residence in the present case is constitutional.

TABLE OF CONTENTS

Page

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT 1

A. Enactment And Amendment Of 18 U.S.C. § 844(i) 2

B. Factual Background 5

C. Proceedings Below 5

INTRODUCTION AND SUMMARY OF ARGUMENT 9

ARGUMENT 14

I. SECTION 844(i) DOES NOT APPLY TO ARSON OF A PRIVATE RESIDENCE 14

A. Section 844(i) May Not Be Interpreted To Apply To Arson Of A Private Residence In The Absence Of Clear And Definite Congressional Intent 15

B. The Text Of Section 844(i) Does Not Manifest Congressional Intent To Federalize Arson Of A Private Residence 17

C. The Legislative History Of Section 844(i) Does Not Reflect Congressional Intent To Federalize Arson Of A Private Residence 27

II. APPLICATION OF SECTION 844(i) TO THE ARSON HERE VIOLATES THE COMMERCE CLAUSE 29

TABLE OF CONTENTS — Continued

Page

A. The Commerce Clause Does Not Authorize General Federal Regulation of Arson Based On A Crude Aggregation Of The Economic Effects Of That Crime 30

1. "Substantial Effects" On Interstate Commerce Of A Noncommercial Activity Such As Arson Cannot Be Established Through Aggregation 31

2. Fundamental Principles of Federalism And Enumerated Powers Preclude The Use Of Aggregation To Undercut The Constitutional Role Of The Jurisdictional Element In This Case 39

B. The Jurisdictional Element In Section 844(i) Precludes Regulation Of Intrastate Conduct That, Like The Conduct Here, Does Not Substantially Affect Interstate Commerce 44

CONCLUSION 50

TABLE OF AUTHORITIES

Page(s)

Cases

A.L.A. Schechter Poultry Corp. v. *United States*, 295 U.S. 495 (1935) 47, 49

American Airlines v. *North American Airlines*, 351 U.S. 79 (1956) 20

Bailey v. *United States*, 516 U.S. 137 ..... *passim*

Bradley v. *United States*, 410 U.S. 605 (1973) 18

Brecht v. *Abrahamson*, 507 U.S. 619 (1993) 39

Brown v. *Gardner*, 513 U.S. 115 (1994) 23

City of Boerne v. *Flores*, 521 U.S. 507 (1997) 44

City of Yonkers v. *United States*, 320 U.S. 685 (1944) 46

Cohens v. *Virginia*, 19 U.S. (6 Wheat.) 264 (1821) ... 17, 39

Edward J. DeBartolo Corp. v. *Florida Gulf Coast Trades Council*, 485 U.S. 568 (1988) 10, 15, 17

Engle v. *Isaac*, 456 U.S. 107 (1982) 39

FERC v. *Mississippi*, 456 U.S. 742 (1982) 24

Garcia v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985) 32

Gibbons v. *Ogden*, 22 U.S. (9 Wheat.) 1 (1824) ... 9, 31, 34

Gulf Oil Corp. v. *Copp Paving Co.*, 419 U.S. 186 (1974) 45, 47

Heart of Atlanta Motel, Inc. v. *United States*, 379 U.S. 241 (1964) 35, 36

Hodel v. *Virginia Surface Mining Ass'n*, 452 U.S. 264 (1981) 35, 36, 37

TABLE OF AUTHORITIES — Continued

Page(s)

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Katzenbach v. *McClung*, 379 U.S. 294 (1964) 35, 36

Lorillard v. *Pons*, 434 U.S. 575 (1978) 20

M'Culloch v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819) 31, 46

Mandeville Island Farms, Inc. v. *American Crystal Sugar Co.*, 334 U.S. 219 (1948) 32

Maryland v. *Wirtz*, 392 U.S. 183 (1968) ..... *passim*

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NLRB v. *Drivers Local Union No. 639*, 362 U.S. 274 (1960) 17

NLRB v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) 10, 35, 48

National Organization for Women v. *Scheidler*, 510 U.S. 249 (1994) 22

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Overstreet v. *North Shore Corp.*, 318 U.S. 125 (1943) 20

Perez v. *United States*, 402 U.S. 146 (1971) 38, 45

Polish National Alliance v. *NLRB*, 322 U.S. 643 (1944) 31, 32, 46, 50

Printz v. *United States*, 521 U.S. 898 (1997) 40

TABLE OF AUTHORITIES — Continued

Page(s)

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Ratzlaf v. *United States*, 510 U.S. 135 (1994) 23, 26

Rewis v. *United States*, 401 U.S. 808 (1971) 16

Russell v. *United States*, 471 U.S. 858 (1985) ..... *passim*

Santa Cruz Fruit Packing Co. v. *NLRB*, 303 U.S. 453 (1938) 35, 49

Shreveport Rate Cases (Houston, E. & W. Tex. Ry. v. *United States)*, 234 U.S. 342 (1914) 35

Stirone v. *United States*, 361 U.S. 212 (1960) 18

United Leather Workers' Int'l Union v. *Herkert & Meisel Trunk Co.*, 265 U.S. 457 (1924) 47

United Savings Ass'n v. *Timbers Associates, Ltd.*, 484 U.S. 365 (1988) 23

United States v. *Bass*, 404 U.S. 336 (1971) ..... *passim*

United States v. *Boston*, 718 F.2d 1511 (10th Cir. 1983), cert. denied, 466 U.S. 974 (1984) 49

United States v. *Darby*, 312 U.S. 100 (1941) ..... *passim*

United States v. *Elders*, 569 F.2d 1020 (7th Cir. 1978) 49

United States v. *Five Gambling Devices*, 346 U.S. 441 (1953) 28, 45

United States v. *Flaherty*, 76 F.3d 967 (8th Cir. 1996) 25

United States v. *Granderson*, 511 U.S. 39 (1994) 17

TABLE OF AUTHORITIES — Continued

Page(s)

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United States v. *Lopez*, 514 U.S. 549 (1995) ..... *passim*

United States v. *McGuire*, 178 F.3d 203 (3d Cir. 1999) 25, 42

United States v. *Melina*, 101 F.3d 567 (8th Cir. 1996) 25

United States v. *Mennuti*, 639 F.2d 107 (2d Cir. 1981) 18, 20, 24

United States v. *Montgomery*, 815 F. Supp. 7 (D.D.C. 1993) 25

United States v. *Moore*, 25 F.3d 1042 (table), 1994 WL 251174 (4th Cir. June 10, 1994), cert. denied, 514 U.S. 1102 (1995) 25

United States v. *Pappadopoulos*, 64 F.3d 522 (9th Cir. 1995) 25

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United States v. *Robertson*, 514 U.S. 669 (1995) 32

United States v. *Rodriguez-Moreno*, 119 S. Ct. 1239 (1999) 7

United States v. *Russell*, 563 F. Supp. 1085 (N.D. Ill. 1983) 27

TABLE OF AUTHORITIES — Continued

Page(s)

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United States v. *Zeigler*, 19 F.3d 486 (10th Cir.), cert. denied, 513 U.S. 1003 (1994) 49

Wickard v. *Filburn*, 317 U.S. 111 (1942) 22, 34, 36

Constitutional and Statutory Provisions

U.S. CONST. art. I, § 8 ..... *passim*

U.S. CONST. art. I, § 8, cl. 6 43

U.S. CONST. art. I, § 8, cl. 10 43

U.S. CONST. art. I, § 8, cl. 17 43

U.S. CONST. art. I, § 8, cl. 18 ..... 13, 32, 34

U.S. CONST. art. III, § 3 43

U.S. CONST. art. IV, § 4 43

15 U.S.C. § 18 21

15 U.S.C. § 18a(c)(1) 21

15 U.S.C. § 79a(c) 22

TABLE OF AUTHORITIES — Continued

Page(s)

15 U.S.C. § 1173(a)(1) 22
17 U.S.C. § 910(a) 22
18 U.S.C. § 513(c)(4) 22
18 U.S.C. § 668(a)(1) 22
18 U.S.C. § 837(c) (1960) 3, 28
18 U.S.C. § 844(d) 3
18 U.S.C. § 844(f) (1970) 23
18 U.S.C. § 844(i) ..... *passim*
18 U.S.C. § 844(j) 25
18 U.S.C. § 848 40
18 U.S.C. § 924(c) 6, 7
18 U.S.C. § 1033(a) 22
18 U.S.C. § 1510(d)(1) 22
18 U.S.C. § 1962(a)-(c) 22
26 U.S.C. § 5861(f) 6
28 U.S.C. § 1254(1) 1
29 U.S.C. § 141 *et seq.* 20
29 U.S.C. § 142 21
29 U.S.C. § 152(6) 21
29 U.S.C. § 185(b) 21
29 U.S.C. § 187(a) 20
29 U.S.C. § 401 *et seq.* 20, 21

TABLE OF AUTHORITIES — Continued

Page(s)

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29 U.S.C. § 402(c) 20
29 U.S.C. § 504(a)(3) 20
29 U.S.C. § 630(h) 21
42 U.S.C. § 2000 *et seq.* 20
42 U.S.C. § 2000e(h) 21
Pub. L. No. 91-452, Title XI, § 1102(a), Oct. 15, 1970, 84 Stat. 956 ..... 3, 23
Pub. L. No. 91-452, § 1106(b), Oct. 15, 1970, 84 Stat. 956 ..... 3, 28

Legislative Materials

116 CONG. REC. (1970) 2, 3, 4, 28
128 CONG. REC. (1982) 5, 28
140 CONG. REC. (1994) 41
Explosives Control: Hearings before Subcommittee No. 5 of the House Comm. on Judiciary on H.R. 17154, H.R. 16699, H.R. 18573 and Related Proposals, 91st Cong., 2d Sess. (1970) 2, 3, 4
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TABLE OF AUTHORITIES — Continued

Page(s)

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TABLE OF AUTHORITIES — Continued

Page(s)

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TABLE OF AUTHORITIES — Continued

Page(s)

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (J.A. 40-44) is reported at 178 F.3d 479. The opinions of the district court denying petitioner's pre-trial motion to dismiss (J.A. 4-7) and his motion for judgment of acquittal following discharge of the jury (J.A. 23-28) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 17, 1999. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section Eight of the United States Constitution provides in pertinent part:

> The Congress shall have Power * * * [t]o regulate Commerce with foreign Nations, and among the several States * * *.

Section 844(i), 18 U.S.C., provides in pertinent part:

> Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned * * *.

STATEMENT

This case concerns whether the federal crime of burning "property used * * * in any activity affecting interstate * * * commerce," 18 U.S.C. § 844(i), applies, and constitutionally may apply, to petitioner's arson of his cousin's private residence, a structure in which no commercial activity took place.

A. Enactment And Amendment Of 18 U.S.C. § 844(i)

1. Section 844(i) was enacted as part of Title XI of the Organized Crime Control Act of 1970, in the wake of a rash of bombings and attempted bombings committed by domestic terrorist organizations and radical student activists. See 116 CONG. REC. 35,206 (1970) (Rep. Clancy); H.R. REP. NO. 91-1549, at 38 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4007, 4013. In an effort to "get tough with * * * terrorists" (116 CONG. REC. 36,296 (Sen. Fannin)), members of Congress introduced several bills to criminalize the wrongful possession, transfer, and use of explosives. See *Explosives Control: Hearings before Subcomm. No. 5 of the House Comm. on Judiciary on H.R. 17154, H.R. 16699, H.R. 18573 and Related Proposals*, 91st Cong., 2d Sess. 4-32, 164-181, 342-447 (1970) ("*Explosives Control Hearings*") (reprinting bills). One bill, H.R. 16699, would have criminalized the bombing or attempted bombing of "any * * * property used for business purposes by a person engaged in commerce or in any activity affecting commerce." H.R. 16699, 91st Cong., 2d Sess. 4 (1970).

At hearings on H.R. 16699 and other bills, Assistant Attorney General William R. Wilson testified that H.R. 16699 had been drafted to protect "any property used for business purposes" to the extent permitted by the Commerce Clause, but that it would not apply to "private homes under normal use." *Explosives Control Hearings*, *supra*, at 37, 56. "The reason, of course, for not protecting" against the bombing of private homes, Wilson explained, "is the basic Federal jurisdiction of interstate commerce." *Id.* at 74.

Several witnesses in the hearings expressed concern that the "business purposes" limitation in H.R. 16699 would bar its application to the bombing of public buildings such as police stations, universities, courthouses, and churches. See, *e.g.*, *Explosives Control Hearings*, *supra*, at 33 (Rep. McCulloch); *id.* at 56 (Rep. Rodino); *id.* at 73 (Rep. Polk); *id.* at 79 (Rep. Smith). Accordingly, the limitation was omitted. See *Russell* v. *United States*, 471 U.S. 858, 860 & n.7 (1985).

But any suggestion that removing the limitation to "business purposes" would bring private residences within the statute's scope was greeted with skepticism. Representative Celler, Chairman of the House Judiciary Committee, suggested that Congress did not have "the power to broaden [a federal bombing statute] to cover a private dwelling * * * under the interstate commerce clause of the Constitution." *Explosives Control Hearings*, *supra*, at 300. When Representative Wylie proposed that Congress make findings that "the bombing of a private dwelling would affect interstate commerce," Chairman Celler questioned whether this would be sufficient to support an exercise of the commerce power. *Id.* at 300-301. Ultimately, no such findings were made, and the bill was not amended to cover bombing of private residences.[1]

In fact, the bill (and Title XI as enacted) repealed a prior statutory provision that purported to prohibit the bombing of private homes. Under that law, explosives used to bomb a "property used for * * * residential * * * objectives" were presumed to have traveled in interstate or foreign commerce. 18 U.S.C. § 837(c) (1960) (repealed by Pub. L. No. 91-452, § 1106(b), 84 Stat. 956 (1970)). The provision was slated for repeal precisely because of concerns that Congress lacked the authority to prohibit the bombing "of a private home." 116 CONG. REC. 35,359 (Chairman Celler); see also *Explosives*

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[1] In the committee debate over H.R. 16699 and other bills, Representative Cramer argued that Congress could punish the bombing of a private home because "any explosive used [for destructive purposes] has to emanate from interstate commerce." *Explosives Control Hearings*, *supra*, at 304-305. Unlike other provisions of Title XI, which regulated explosives transported or received in interstate commerce, see Pub. L. No. 91-452, § 1102(a), 84 Stat. 956 (1970) (codified at 18 U.S.C. § 844(d)), Section 844(i) as enacted did not regulate explosives that had been in interstate commerce but instead relied on a connection between the use of the subject property and interstate commerce as the basis for federal regulation.

Control Hearings, *supra*, at 37 (Assistant Attorney General Wilson).

H.R. 16699 was reported out of the House Judiciary Committee as part of S. 30, the Organized Crime Control Act of 1970. The committee report did not mention private residences, but described Section 844(i) as "a very broad provision covering substantially all business property." H.R. REP. NO. 91-1549, at 70.

During floor debate over S. 30, Representative Hungate asked whether Section 844(i) would criminalize bombing of a private residence. 116 CONG. REC. 35,359. Chairman Celler responded that "the mere bombing of a private home even under this bill would not be covered because of the question whether the Congress would have the authority under the Constitution." *Ibid.* Representative Hungate offered an amendment that was intended to reach bombings of all property by enacting a rebuttable presumption that the explosives used had traveled in interstate commerce. *Id.* at 35,319. The amendment failed, however, and the bill was passed after only brief additional debate. *Id.* at 35,363-35,364. The Senate subsequently passed S. 30, with no mention of private residences. See *id.* at 36,296.

2. As originally enacted, Section 844(i) prohibited only the destruction or attempted destruction of property by means of "an explosive," and did not apply to arson generally. This limitation caused problems in practical application. Accordingly, Congress enacted the Anti-Arson Act of 1982, which amended various provisions of Title 18, including Section 844(i), to apply to arson or attempted arson committed "by means of fire or an explosive." H.R. REP. NO. 97-678, at 1 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2631, 2631.

"The jurisdictional circumstances enumerated in * * * section 844 * * * remain[ed] unchanged" by the 1982 amendment. *Id.* at 1. Representative Rodino, Chairman of the House Judiciary Committee and co-sponsor of the bill, assured his

colleagues that it was "***not*** intended to expand Federal jurisdiction over arson offenses generally." 128 CONG. REC. 18,816 (1982) (emphasis added).

B. Factual Background

On February 23, 1998, petitioner Dewey Jones visited the Fort Wayne, Indiana, residence of his cousin, James Walker. See Tr. 35-36, 116-117 (June 17, 1998). Jones earlier had telephoned the house in an unsuccessful effort to speak to Walker. *Id.* at 112-114. Before seeking out Walker in person, Jones purchased a large bottle of beer at a Fort Wayne liquor store, then, after emptying the bottle, filled it with gasoline at a nearby service station. *Id.* at 35-36.

When Jones appeared at the Walker residence, he encountered Walker's wife, Lisa; again, Walker was not home. Tr. 36, 116-117, 159 (June 17, 1998). After telling Mrs. Walker, "I don't have nothing against you or your kids, this is between me and him [*i.e.*, Walker], but he is avoiding me," Jones threw a lit Molotov cocktail into the living room of the Walker residence, causing fire damage. *Id.* at 116-117. He escaped, briefly, in a Ford Explorer driven by another cousin, Jermaine Gist. *Id.* at 117, 147-150.

At first, the Fort Wayne police and fire departments investigated the arson. Tr. 33, 50 (June 17, 1998). The fire department notified the federal Bureau of Alcohol, Tobacco, and Firearms, however, and the BATF took over the investigation. *Id.* at 50.

C. Proceedings Below

1. On March 25, 1998, a federal grand jury returned a three-count indictment. J.A. 2-3. Jones and Gist were charged with arson in violation of 18 U.S.C. § 844(i), and using a destructive device during and in relation to a crime of violence punishable as a federal offense (*i.e.*, the arson) in violation of 18 U.S.C. § 924(c). Jones was also charged with making an illegal destructive device in violation of 26 U.S.C. § 5861(f).

Jones and Gist moved to dismiss the count charging a violation of Section 844(i) for want of a sufficient connection to interstate commerce. J.A. 4-5. The district court denied the motions, J.A. 4-7, and the case proceeded to trial.

2. At trial, the parties stipulated that Jones had thrown a Molotov cocktail through the window of the Walker residence and that the Molotov cocktail was an "explosive" within the meaning of 18 U.S.C. § 844(i) and a "firearm" within the meaning of 18 U.S.C. § 924(c) and 26 U.S.C. § 5861(f). J.A. 8. Accordingly, the principal issue for the jury was whether the Walker residence was "used in interstate or foreign commerce or in an activity affecting interstate or foreign commerce" as necessary to satisfy the jurisdictional element of Section 844(i).

The government presented no evidence that the Walkers conducted any business in their house, and the government did not claim that the Walker residence was used "in interstate commerce." See J.A. 22. Instead, the government contended that three pieces of evidence showed that the Walker home was used in an "activity affecting interstate commerce" within the meaning of Section 844(i).

First, an out-of-state company, Midland Mortgage of Oklahoma City, Oklahoma, held a mortgage on the Walker residence. J.A. 13-14, 17. A witness from the mortgage company testified, however, that the company suffered no loss as a result of the fire. J.A. 14. Second, natural gas was supplied to the Walker residence by the Northern Indiana Public Service Company, an in-state utility company that purchased its natural gas from "field zones" in Texas, Louisiana, the Rocky Mountains, and elsewhere. J.A. 15-16, 17-18. There was no evidence, however, that the supply of natural gas to the Walker residence was interrupted as a result of the fire. Cf. Tr. 87-99 (June 17, 1998). Third, the Walker residence was insured by a company with an out-of-state headquarters, which paid the Walkers' insurance claim for damage resulting from the fire with a draft from an out-of-state bank. J.A. 8-10, 17. The

insurer had approximately 20 employee agents in Fort Wayne, Indiana, however, and the Walkers' insurance claim was settled by an employee claims adjuster who had authority to settle claims only in Fort Wayne. J.A. 8-9, 11.

3. Before the case was submitted to the jury, Jones moved for acquittal on the Section 844(i) count, again contending that the evidence was insufficient to show that the Walker property was used in interstate commerce or in any activity affecting interstate commerce. The district court denied the motion. Tr. 163-165, 177-179 (June 17, 1998).[2] Jones also objected to the government's proposed jury instruction on the jurisdictional element of Section 844(i), which provided that "to show that the real property was used in activity affecting interstate commerce, the government need only establish a minimal connection between the real property at issue and some aspect of interstate commerce." J.A. 18. The district court overruled the objection and gave the government's proposed instruction. *Id.* at 20-22.

4. The jury convicted Jones on all three counts, and the district court denied Jones' post-verdict motion for a judgment of acquittal on the Section 844(i) count and the count under 18 U.S.C. § 924(c).[3] J.A. 23-28. Following Seventh Circuit precedent, the district court held that the government was required to show only "a slight effect on interstate commerce" under Section 844(i). *Id.* at 27 (internal quotation marks omitted).

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[2] The district court granted Gist's motion for a judgment of acquittal on other grounds. See Tr. 165-167, 173-175 (June 17, 1998).

[3] The Section 924(c) count charged Jones with using and carrying a destructive device "during and in relation to a crime of violence for which [he] may be prosecuted in a court of the United States, arson in violation of 18 U.S.C. § 844(i)." See J.A. 2-3. An element of the Section 924(c) offense is an underlying crime of violence "for which the person may be prosecuted in a court of the United States." See *United States* v. *Rodriguez-Moreno*, 119 S. Ct. 1239, 1243 (1999). If the evidence is insufficient to support Jones' conviction under Section 844(i), it is insufficient to support the conviction under Section 924(c).

Under that test, the district court concluded, "the natural gas connection alone suffices to supply the interstate commerce element." *Id.* at 26.

Jones was sentenced to 35 years in prison, over the objection of his victim, Walker, that the sentence was far more severe than the sentence Jones would have received in state court. See J.A. 30-31, 38; Tr. 18-19 (Aug. 26, 1998). The district court agreed that the sentence, which was mandated by statutory minima, was "probably * * * excessive." *Id.* at 21.

5. The Seventh Circuit affirmed. J.A. 44. The court of appeals took for granted that the statute was satisfied by "proof of a slight effect" on interstate commerce, but considered whether application of the statute was constitutional in light of this Court's decision in *United States* v. *Lopez*, 514 U.S. 549 (1995). J.A. 40-41. The Seventh Circuit concluded that, under *Lopez*, Section 844(i) could reach only activities that "substantially affect commerce." *Id.* at 41.

The court of appeals then considered whether that standard had been met. The court acknowledged that the interstate connections proven by the government — out-of-state natural gas, insurance, and mortgage — "are pretty slight for a single building" and "don't establish a 'substantial' connection between this arson (or this residence) and interstate commerce." J.A. 41. The court nonetheless found that the statute was constitutionally applied.

First, the Seventh Circuit observed that "the residential housing industry is interstate in character." J.A. 42. The court explained that "[g]oods and materials for housing move across state borders; gas and electricity likewise; the financial and insurance markets that provide loans and spread risks have national if not international scope; arson can substantially affect all of these." *Ibid.* The court of appeals concluded that this connection between interstate commerce and residential real estate *in toto* was sufficient to render application of Section 844(i) constitutional in this case. *Id.* at 42-43.

Second, taking a different approach, the Seventh Circuit pondered "whether 'arson of buildings' or even 'arson of residences' substantially affects commerce," and concluded that "the answer still must be yes." J.A. 43. The court considered the damage caused by all such arson taken together, and found that "[i]f even a small fraction of the loss is covered by interstate insurance markets, the effect is 'substantial.'" *Ibid.* In addition, the court noted, arson of residential properties "affect[] gas, electric, and telephone service, require[] the occupants to stay at hotels while repairs [a]re completed (a sure sign of interstate commerce * * *), [lead] friends and loved ones to travel from other states to give comfort to the victims, and so on." *Id.* at 43-44. These collective effects, the court concluded, in tandem with "proof of a slight connection between the particular arson and interstate commerce," were sufficient to permit application of Section 844(i). *Id.* at 44.

INTRODUCTION AND SUMMARY OF ARGUMENT

The very idea that Congress might enact a general, nationwide, federal criminal law prohibiting arson within the local jurisdiction of the States would have shocked the Framers of the Constitution. Arson is one of the oldest crimes, and real property is quintessentially local. The Constitution "withhold[s] from Congress a plenary police power that would authorize enactment of every type of legislation." *United States* v. *Lopez*, 514 U.S. 549, 566 (1995). Rather, "[t]he Constitution creates a Federal Government of enumerated powers," *id.* at 552, and the "enumeration principle" necessarily "presupposes something not enumerated." *Id.* at 553 (quoting *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 195 (1824)).

The Commerce Clause does not override these limits. The grant of federal authority to "regulate Commerce * * * among the several States" is not cryptic short-hand for unlimited power that, through a generalized analysis of the economic effects of human behavior, can reach all or nearly all intrastate conduct. To the contrary, Congress simply may not "use a relatively

trivial impact on commerce as an excuse for broad general regulation of state or private activities." *Lopez*, 514 U.S. at 558 (quoting *Maryland* v. *Wirtz*, 392 U.S. 183, 197 n.27 (1968)). If a federal commerce regulation goes beyond what is actually in interstate commerce, it can reach only activity that "***substantially*** affects" interstate commerce. *Lopez*, 514 U.S. at 559 (emphasis added). Congress oversteps constitutional limits when it regulates an intrastate activity based on "effects upon interstate commerce so indirect and remote that to embrace them * * * would effectually obliterate the distinction between what is national and what is local and create a completely centralized government." *Id.* at 557 (quoting *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)).

These principles necessarily govern interpretation of a statute that invokes the commerce power to regulate intrastate activity. When some applications of such a statute might exceed the limits of that power, the statute should be construed to avoid constitutional doubt unless the saving "construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Trades Council*, 485 U.S. 568, 575 (1988) (collecting cases). That rule is reinforced where one construction of the statute would "define as a federal crime conduct readily denounced as criminal by the States." *United States* v. *Bass*, 404 U.S. 336, 349 (1971). In such cases, basic concepts of American federalism require that, "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance" by federalizing wholly local crime. *Lopez*, 514 U.S. at 562 (quoting *Bass*, 404 U.S. at 349). In the absence of such a clear statement, the rule of lenity provides an additional reason to interpret Section 844(i) to exclude arson of private residences.

1. Application of these settled principles removes petitioner's arson from the scope of Section 844(i). That provision prohibits arson of "property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce." It is doubtful, at best, that the power to "regulate

Commerce * * * among the several States" includes the power to prohibit the damage or destruction of a private residence in which no commercial activity takes place. The destruction of property by fire or explosives is not an interstate act and is neither commerce nor commercial. Thus, the commerce power does not suggest authority to regulate arson generally. As Congress recognized, Section 844(i) can be constitutional, if at all, only through the operation of its jurisdictional limitation to property that is "used in interstate * * * commerce or in any activity affecting interstate * * * commerce."

But that jurisdictional limitation can render Section 844(i) constitutional only if it accurately separates conduct that is subject to the commerce power from conduct that is not. Arson is not sufficiently related to interstate commerce as to afford Congress the power to regulate arson in all its manifestations; the mere recitation of a link to commerce does not cure the want of authority if the purported limitation may be satisfied by insubstantial factors. Congress cannot expand its commerce power by including sham jurisdictional elements in statutes that accomplish plenary regulation of noncommercial conduct.

There is no reason to interpret the jurisdictional element of Section 844(i) to be toothless, and thus to permit applications of the statute that likely violate the Constitution. The normal meaning of the terms of the statute weighs heavily against such a gloss. A "property" is "used in an[] activity affecting interstate * * * commerce" only when it is used instrumentally for a commercial (though not necessarily for-profit) purpose. Passive receipt for end-use of interstate utilities, or the mere existence of interstate loans and insurance, are not "uses" of the affected property, nor are such relationships "activities affecting interstate * * * commerce." Such "activities" must be commercial, at least in a broad sense. Moreover, in light of the function of the jurisdictional element in ensuring that Section 844(i) is applied constitutionally — and thus in limiting its application to intrastate activities that substantially affect commerce — the "activities" that subject property to Section

844(i) should be confined to those that substantially affect interstate commerce. That further compels an interpretation of Section 844(i) that excludes private residences from its scope.

The legislative history confirms that Congress did not intend to prohibit the arson of private residences. Indeed, Congress repealed a provision of prior law that purported to do so, and declined to follow the suggestions of two members that Section 844(i) be drafted to cover residences, precisely because of doubt that the Constitution permitted what would amount to plenary regulation of arson.

2. If, however, this Court concludes that "property used in an activity affecting interstate * * * commerce" ***must*** include a private residence where no commercial activity takes place — or must include any structure that receives utility service from an ultimately interstate supply, that has been purchased using funds from an interstate lender, and that has been insured with an interstate insurer — the application of Section 844(i) to this case exceeds the limits of the commerce power. Section 844(i) constitutionally may be applied only to arson that substantially affect interstate commerce. The connections between interstate commerce and the arson here are too thin.

It cannot seriously be contended that our federalism permits Congress to regulate all arson, or all theft, or all murder, based on the inherent significance of those common state crimes to interstate commerce. But such regulation would be permitted if the government and the Seventh Circuit are correct that a constitutionally substantial effect on interstate commerce may be shown by adding together the nationwide financial impact of any intrastate activity. The government and the court of appeals relied on this application of the aggregation device to contend that the nexus between a particular arson and interstate commerce need not be substantial in order to pass constitutional muster.

This Court has limited its use of the aggregation principle to commercial activities. It is not surprising that a power to

regulate ***commerce*** reaches ***commercial*** activities far more easily than noncommercial ones. Only when the ***qualitative*** effects on interstate commerce of regulated conduct are substantial does the aggregation device permit the conduct's ***quantitative*** effects on interstate commerce to be added together, so as to bring within federal jurisdiction incidences of that conduct that have minimal impact on their own.

The distinction between commercial and noncommercial activities reflects the origin of this Court's approval of federal regulation of intrastate activity that is not interstate commerce but substantially affects it. An exercise of the commerce power based on the substantial effects of the regulated activity depends on the operation of the Necessary and Proper Clause in conjunction with the Commerce Clause. Using aggregation of effects as a way to bring an entire activity within the commerce power — so that regulation may reach individual instances of the activity that have insubstantial effects standing alone — is necessary and appropriate in only two situations: when interstate activities are so commingled with intrastate activities that regulation of one cannot be effective without regulation of the other, and when an intrastate activity is closely related to interstate commerce, and threatens an aspect of it, but is beyond effective regulation by individual States. A noncommercial activity like arson does not have the close relation with interstate commerce needed to invoke the aggregation device under either rationale.

Additional considerations preclude permitting federal regulation of arson without requiring proof of a substantial effect on commerce through the jurisdictional element. The regulated conduct, arson, is the very model of a traditional state crime. It is the type of felony that long has been acknowledged to be a concern of the States rather than the federal government. And the application of the aggregation principle here proceeds under a rationale that cannot logically stop short of conferring general power upon the federal government to regulate all local crime based on its aggregate economic effects. Such conver-

sion of the Commerce Clause into a grant of plenary police power not only disturbs the state-federal balance, but renders meaningless the distinct and limited powers to combat crime that are enumerated in the Constitution.

Once it is clear that the aggregation principle does not excuse case-by-case demonstration of substantial effects on interstate commerce before Section 844(i) may be applied, it is equally clear that the statute may not be constitutionally applied to the arson in this case. The Seventh Circuit recognized that the asserted links to interstate commerce here were not substantial. The basic incidents of home ownership and household support do not substantially affect interstate commerce, and thus cannot provide the nexus to interstate commerce needed to bring petitioner's arson within the constitutional scope of Section 844(i). Even if aggregation may play some role in lightening the load of the jurisdictional element, the connections between regulated conduct and interstate commerce nonetheless must be less speculative and attenuated than the trivial particulars relied on in this case.

ARGUMENT

I. SECTION 844(i) DOES NOT APPLY TO ARSON OF A PRIVATE RESIDENCE

That Congress could exert nationwide power to prohibit arson is not immediately apparent from the terms of the grant of authority "[t]o regulate Commerce * * * among the several States." The Congress that enacted Section 844(i) certainly did not think so. To the contrary, Congress recognized that something more was needed to render an arson prohibition constitutional, and so included a jurisdictional element that "would ensure, through case-by-case inquiry," that particular instances of the regulated activity ***did*** fall within the commerce power. See *Lopez*, 514 U.S. at 561-562. That jurisdictional provision does not embrace private residences.

A. Section 844(i) May Not Be Interpreted To Apply To Arson Of A Private Residence In The Absence Of Clear And Definite Congressional Intent

As this Court acknowledged in granting certiorari, statutes should be interpreted where possible to avoid "constitutionally doubtful constructions." See J.A. 45 (citing *DeBartolo*, 485 U.S. at 575). Reflecting the "prudential concern that constitutional issues not be needlessly confronted," this principle applies not only where a particular interpretation of a statute clearly would violate the Constitution, but also where the interpretation would raise serious questions about the statute's validity. *DeBartolo*, 485 U.S. at 575; *International Ass'n of Machinists* v. *Street*, 367 U.S. 740, 749 (1961). When one reasonable construction of a statute avoids the constitutional concerns raised by an alternate interpretation, only the clearest indication of congressional intent can support adoption of the constitutionally questionable reading. *DeBartolo*, 485 U.S. at 577.

The government has acknowledged that any interpretation of Section 844(i) that would reach the conduct in this case raises constitutional doubts. In resisting certioriari, the government stated that "the Court's decision in [*United States* v. *Morrison*, No. 99-5, and *Brzonkala* v. *Morrison*, No. 99-29] may affect the proper resolution of the question" whether Congress has the power under the Commerce Clause to punish arson of a private residence, and thus urged unsuccessfully that "the petition should be held pending this Court's decision" in those cases. U.S. Br. (Opp.) 4-5; see *id.* at 11-12. Pending decisions on the scope of the commerce power could not affect the disposition of this case unless serious constitutional questions about that power were present here. The government's apprehension about the constitutionality of the application of Section 844(i) in this case was well-founded. As we explain below, application of Section 844(i) to arson of a private residence would violate the constitutional limits on congressional power under the Commerce Clause. That

constitutional issue can and should be avoided here, where the everyday meaning of the jurisdictional element excludes private residences from the statute's scope.

There is another, related reason to interpret Section 844(i) as a limited regulation of specific arson, rather than a general assertion of jurisdiction over the burning of all or nearly all property. "When Congress criminalizes conduct already denounced as criminal by the States, it effects a change in the sensitive relation between federal and state criminal jurisdiction." *Lopez*, 514 U.S. at 561 n.3 (internal quotation marks omitted). This Court must reject a statutory construction that "renders traditionally local criminal conduct a matter of federal enforcement and would also involve a substantial extension of federal police resources" unless, by clear statement, Congress has compelled the interpretation. *Bass*, 404 U.S. at 350-352. Thus, where a statute is amenable to two interpretations, the broader of which would extend federal jurisdiction over a whole range of conduct that has been "traditionally subject to state regulation," the narrower construction should be adopted unless a contrary intent is unmistakably clear. *Rewis* v. *United States*, 401 U.S. 808, 812 (1971).

The decision below would make arson of every occupied building a federal crime, subject to federal investigation and prosecution. Yet real property is surpassingly local, and residential arson is among the most firmly rooted state crimes: it has been criminalized by the States "[f]rom the earliest colonial days," and is a felony under the laws of all fifty States. See Panneton, *Federalizing Fires: The Evolving Federal Response to Arson Related Crimes*, 23 AM. CRIM. L. REV. 151, 151 (1985); Poulos, *The Metamorphosis of the Law of Arson*, 51 MO. L. REV. 295, 342-344 & nn.221, 223-262 (1986). It thus was exactly the kind of crime that Chief Justice Marshall and this Court had in mind in holding it "clear, that congress cannot punish felonies generally." *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 428 (1821). See *Lopez*, 514 U.S. at 596 (Thomas, J., concurring).

These principles counsel restraint in interpreting Section 844(i), so that the statute is not unnecessarily applied to extend beyond the scope that can reasonably be justified as a regulation for protection of interstate commerce. The text, structure, and history of the statute support (indeed, compel) an interpretation that confines the word "used" to a meaning consonant with normal speech, and that restricts "activity affecting" interstate commerce to commercial pursuits and similar activities. There is absolutely ***no*** indication in the legislative sources — much less the "requisite 'clearest indication,'" *DeBartolo*, 485 U.S. at 577 (quoting *NLRB* v. *Drivers Local Union No. 639*, 362 U.S. 274, 284 (1960)) — that Congress intended Section 844(i) to federalize arson of private residences. This Court therefore need not, and should not, construe that statute to reach that far.

Indeed, even if the text and legislative history of Section 844(i) were sufficiently ambiguous to permit an interpretation of the statute that would federalize the arson of a private residence, the rule of lenity would require that the ambiguity be resolved in Jones's favor. See *United States* v. *Granderson*, 511 U.S. 39, 54 (1994); *McNally* v. *United States*, 483 U.S. 350, 359-360 (1987). A reasonable person would not apprehend that the arson of a private family home involved a "property used * * * in any activity affecting interstate or foreign commerce." See pp. 17-20, *infra*; see also *Bass*, 404 U.S. at 348-349 & n.15.

B. The Text Of Section 844(i) Does Not Manifest Congressional Intent To Federalize Arson Of A Private Residence

1. The only evidence proffered to satisfy the jurisdictional element of Section 844(i) showed that "the owner of the residence purchased natural gas in interstate commerce, secured a mortgage from an out-of-state lender, and received an insurance check from an out-of-state insurer." J.A. 40-41. But the "ordinary and natural meaning" of "use[] in an activity" is

not satisfied by "use" of one's house for the receipt of natural gas, a mortgage, or insurance. See *United States* v. *Mennuti*, 639 F.2d 107, 110 (2d Cir. 1981) (Friendly, J.). Nor are the maintenance of a mortgage and homeowners' insurance, and the receipt of natural gas, activities in which the property is "used" in the normal, active, implementing sense. See *United States* v. *Ryan*, 41 F.3d 361, 369 (8th Cir. 1994) (en banc) (Arnold, C.J., dissenting), cert. denied, 514 U.S. 1082 (1995). The language of Section 844(i) does not support such strained constructions, and they should be rejected.

The interpretation of a statute begins, of course, with its text. *E.g.*, *Bailey* v. *United States*, 516 U.S. 137, 144 (1995). Section 844(i) purports to reach only the actual or attempted damage or destruction of property that is "***used*** in interstate or foreign commerce or ***in any activity affecting interstate or foreign commerce***" (emphasis added). The government must prove the stated nexus with interstate commerce as a separate element of the crime. See, *e.g.*, *Stirone* v. *United States*, 361 U.S. 212, 218 (1960); *United States* v. *Latouf*, 132 F.3d 320, 325 (6th Cir. 1997), cert. denied, 523 U.S. 1101 (1998).

The phrase "used * * * in any activity affecting interstate or foreign commerce" must be construed in accord with its ordinary and natural meaning, see *Bailey*, 516 U.S. at 145, bearing in mind that "familiar legal expressions" should be understood in their "familiar legal sense." *Bradley* v. *United States*, 410 U.S. 605, 609 (1973). Accordingly, the text of Section 844(i) invokes an inquiry that first determines how the property was "used" — *i.e.*, its function — and then asks whether (and how) that function affects interstate commerce. See Cunningham & Fillmore, *Using Common Sense: A Linguistic Perspective on Judicial Interpretations of "Use a Firearm,"* 73 WASH. U. L.Q. 1159, 1176 (1995); Egan, Note, *The Jurisdictional Element of 18 U.S.C. § 844(i), A Federal Criminal Commerce Clause Statute*, 48 WASH. U.J. URB. & CONTEMP. L. 183, 209 (1995).

Because the statutory terms echo statements defining the limits of Congress's power to regulate under the Commerce Clause, *e.g.*, *United States* v. *Darby*, 312 U.S. 100, 118 (1941), the ordinary and natural meaning of the jurisdictional element encompasses property that is actively employed in a pursuit that affects interstate commerce in a constitutionally significant way, that is, in a pursuit that "substantially affects" interstate commerce. *Lopez*, 514 U.S. at 559. Thus, one "uses" a residential property to live in or to rent out for profit. One "uses" a business property to conduct a commercial enterprise. One "uses" a warehouse to store inventory. One "uses" a car to drive to and from work. If these pursuits substantially affect interstate commerce, then arson of the property falls within the statute.

The normal meaning of each statutory term supports this common-sense reading. The word "use" connotes the active "application or employment of something," especially its employment "for the purpose for which it is adapted." BLACK'S LAW DICTIONARY 1540 (7th ed. 1999); see also 19 OXFORD ENGLISH DICTIONARY 353, 354 (2d ed. 1989) (defining "use" as "to employ for a certain end or purpose," "to employ or make use of (an article, etc.) esp. for a profitable end or purpose," and "to employ * * * in some function or capacity, esp. for an advantageous end"). To "use" a structure implies some "action and implementation," *Bailey*, 516 U.S. at 145, directed toward a purpose. Similarly, ordinary meanings of "activity" include a "specific action or pursuit," WEBSTER'S NEW WORLD DICTIONARY 14 (3d ed. 1988); a "specified pursuit," AMERICAN HERITAGE DICTIONARY 18 (3d ed. 1992), or "[a]n occupation or pursuit in which a person is active," BLACK'S LAW DICTIONARY 33 (6th ed. 1990).

These definitions suggest affirmative and goal-oriented employment of property to perform a function, not the passive receipt of goods and services related to the property, and colloquial speech confirms that definition. When asked if she had "used" her empty vacation home over the weekend, a

normal person would not reply, "Yes, it received natural gas." And one does not refer to "using" an automobile to store a tank of gasoline. No one says she "uses" her house to carry the mortgage. And no one speaking normally would refer to "using" a home to insure it.

As Judge Friendly observed, "[t]o the ordinary mind, the destruction of * * * private dwellings would not constitute the destruction of buildings used in * * * any activity affecting interstate commerce." *Mennuti*, 639 F.2d at 109. That should be the end of the matter.

2. Section 844(i) incorporates the well-worn phrase, "activity [or activities] affecting interstate * * * commerce." Before enacting that Section in 1970, Congress had included the same or similar jurisdictional limitations in many other statutes to support federal regulation of intrastate conduct. Those usages provide persuasive context for construing the same limiting terms in Section 844(i). See, *e.g.*, *Lorillard* v. *Pons*, 434 U.S. 575, 581 (1978); *American Airlines* v. *North American Airlines*, 351 U.S. 79, 82 (1956); *Overstreet* v. *North Shore Corp.*, 318 U.S. 125, 131-132 (1943). Indeed, the committee report expressly invoked similar statutes as models for Section 844(i). See H.R. REP. NO. 91-1549, at 70 (referencing the Labor Management Relations Act, 29 U.S.C. § 141 *et seq.* ("LMRA"), the Labor Management Reporting and Disclosure Act, 29 U.S.C. § 401 *et seq.* ("LMRDA"), and the Civil Rights Act of 1964, 42 U.S.C. § 2000 *et seq.*).

When Congress regulated "activities affecting interstate commerce" before 1970, the activities being regulated were commercial or business-related. Federal labor law — which was expressly invoked as a model for Section 844(i) — prohibits unfair labor practices in "an industry or activity affecting commerce." 29 U.S.C. § 187(a); see also *id.* §§ 402(c), 504(a)(3). In the contemplation of the LMRA, it was "employer[s]" "whose activities affect commerce" (*id.* § 185(b)). And when the LMRA defined an "industry affecting

commerce," the term included either an "industry or activity" that was "in commerce" (*i.e.*, in interstate "trade, traffic, commerce, transportation, or communication," *id.* § 152(6)), or one in which a labor dispute might tend to burden or obstruct interstate commerce or its free flow. *Id.* § 142; see also *id.* § 402(a). There is no question that these provisions reach only businesses and similar entities. Indeed, only three years before the enactment of Section 844(i), the Age Discrimination in Employment Act borrowed from the labor laws a definition of "industry affecting commerce" that included any "activity, business, or industry" with a defined nexus to interstate commerce. 29 U.S.C. § 630(h) (referencing LMRDA, *id.* § 401 *et seq.*). Another model for the jurisdictional provision of Section 844(i), the employment provisions of the Civil Rights Act of 1964, also adopted the labor law usage of "activity * * * affecting commerce" as a type of "industry affecting commerce." 42 U.S.C. § 2000e(h).

Other well-known statutes used some version of the phrase "activity affecting interstate commerce"; all of them did so in a way that made clear that the only "activity" that was contemplated was ***commercial*** activity (which might include non-profit enterprises). Thus, the antitrust laws limiting mergers and acquisitions speak in terms of the acquisition of one "person engaged in commerce or in any activity affecting commerce" by another. 15 U.S.C. § 18. The similarly worded pre-merger notification requirement, enacted shortly after Section 844(i), contained an exception for acquisitions or transfers of "goods, or realty * * * in the ordinary course of business" — presuming that "business" is the "ordinary course" for a person engaged in "any activity affecting commerce." 15 U.S.C. § 18a(c)(1). Similarly, the Racketeer-Influenced and Corrupt Organizations Act of 1970, enacted together with Section 844(i), referred to the "activities" of an "enterprise" "which affect[] interstate or foreign commerce," 18 U.S.C. § 1962(a)-(c); the statute made clear that an "enterprise" was a collective and purposeful undertaking, though not necessarily

for economic ends. See *National Organization for Women* v. *Scheidler*, 510 U.S. 249, 257-262 (1994). These and other prior, contemporaneous, and subsequent usages of "activities affecting interstate commerce" provide compelling evidence that Section 844(i) reflects a similar understanding of those common statutory terms to mean purposeful business or commercial activities.[4]

The statutory language arises from this Court's approval of federal efforts to regulate "activities intrastate which so affect interstate commerce * * * as to make regulation of them appropriate." *Darby*, 312 U.S. at 118; see also, *e.g.*, *United States* v. *Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942); *Wickard* v. *Filburn*, 317 U.S. 111, 124 (1942). In considering what intrastate activities affected interstate commerce in this way, however, this Court addressed only intrastate business conduct with interstate consequences. See, *e.g.*, *Wrightwood Dairy*, *supra* (sale of milk); *Darby*, *supra* (lumber mill); *Wickard*, *supra* (production and consumption of wheat, an interstate commodity).

3. "[T]he meaning of statutory language," of course, "depends on context." *Bailey*, 516 U.S. at 145 (quoting *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994)). The structure of the

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[4] See, *e.g.*, 15 U.S.C. § 79a(c) (public utility holding companies are engaged in "activities which directly affect or burden interstate commerce"); 15 U.S.C. § 1173(a)(1) (regulating "activities" of "the business of manufacturing gambling devices" if they "affect interstate * * * commerce"); 17 U.S.C. § 910(a) (prohibiting violation of intellectual property rights of semiconductor chip products "by conduct * * * affecting commerce"); 18 U.S.C. § 513(c)(4) (defining "organization" as any "corporation, company, association, firm, partnership, joint stock company, foundation, institution, society, union, or any other association * * * the activities of which affect interstate" commerce); 18 U.S.C. § 668(a)(1) (defining "museum" as institution "the activities of which affect interstate" commerce); 18 U.S.C. § 1033(a) (prohibiting fraudulent conduct by "persons engaged in the business of insurance whose activities affect interstate commerce"); 18 U.S.C. § 1510(d)(1) (prohibiting obstruction of justice by person "engaged in the business of insurance whose activities affect interstate commerce").

original Section 844 as a whole confirms that "use[] * * * in an activity affecting interstate * * * commerce" denotes more than an end-user's passive receipt of interstate goods or services.

If the mere receipt of interstate utilities or other commodities constituted the use of property in an activity affecting interstate commerce, another subsection of the original Section 844 would have been entirely superfluous. Section 844 originally prohibited the damage or destruction by explosives of ***two*** different types of property. Section 844(i) covered property "used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce," while Section 844(f) originally covered property "owned, possessed, or used by, or leased to, the United States, any department or agency thereof, or any institution or organization receiving Federal financial assistance." See Pub. L. No. 91-452, § 1102(a), 84 Stat. 956 (1970) (codified at 18 U.S.C. § 844(f) (1970)). If Section 844(i) covered any property that receives utilities or a *de minimis* amount of goods or services interstate, there would have been no need for Congress also to prohibit damage or destruction of a property used by the federal government or receiving federal funds. The broad interpretation of property "used * * * in any activity affecting interstate or foreign commerce" applied by the Seventh Circuit in this case would improperly render Section 844(f), as enacted, a "practical nullity." *United Savings Ass'n* v. *Timbers Associates, Ltd.*, 484 U.S. 365, 375 (1988); *Bailey*, 516 U.S. at 147-148; *Ratzlaf* v. *United States*, 510 U.S. 135, 140-141 (1994).

4. The jurisdictional element in Section 844(i) was intended to separate out buildings and other property with sufficient connections to interstate commerce to make them permissible objects of federal regulation. That, of course, requires limiting "activities affecting interstate * * * commerce" to those that "substantially affect" interstate commerce. See *Lopez*, 514 U.S. at 559. Likewise, to draw a rational distinction between those properties that substantially affect commerce and those that do not, the property must be actively

and "currently used." *Mennuti*, 639 F.2d at 113. A property used for one purpose today may be used for another, or none at all, tomorrow. "Residential" garages may house embryonic businesses, and "commercial" structures may be converted to purely private residential use, like the former shops that now are Georgetown living rooms. By contrast, to interpret Section 844(i) to reach private residences or other structures based solely on the receipt of utilities or interstate commodities, or the maintenance of insurance or financing, would have the practical effect of eliminating the interstate commerce element of the offense — and would have done so equally in 1970 — given the reality that any property in the modern world has at least some *de minimis* link to interstate commerce.

Every State except Alaska imports at least some natural gas from out-of-state sources, and there is no way to determine the source of gas that has been transported to a consumer. See U.S. DEP'T OF ENERGY, ENERGY INFORMATION ADMIN., NATURAL GAS ANNUAL 1997, at 22-27 (1998). "No State relies solely on its own resources" for electrical power. *FERC* v. *Mississippi*, 456 U.S. 742, 757 (1982). The prevalence of regional and national insurers, and the active market in the sale of mortgages, makes interstate contacts of that kind inevitable. Any property with telephone service receives interstate communications services. The list of interstate goods and services that are provided to the typical private home — junk mail, cable television, parcel delivery — defies enumeration.

The government and some federal courts are all too willing to rely on attenuated links of this kind to establish the interstate commerce element of Section 844(i). This was not the first time the government has contended that a building was "used" in the "activity" of receiving natural gas or electricity.[5] Nor is

[5] See, *e.g.*, *United States* v. *Melina*, 101 F.3d 567, 572 (8th Cir. 1996); *United States* v. *Flaherty*, 76 F.3d 967, 973 (8th Cir. 1996); *United States* v. *Pappadopoulos*, 64 F.3d 522, 525 (9th Cir. 1995); *United States* v. *Vogel*, 37 F.3d 1497 (table), 1994 WL 556994, at *8 (4th Cir. Oct. 12, 1994); *United States* v. *Ramey*, 24 F.3d 602, 607 (4th Cir. 1994), cert. denied, 514 U.S. 1103 (1995); *United States* v. *Ryan*, 9 F.3d 660, 666 (8th Cir. 1993), as amended on reh'g, 41 F.3d 361 (1994), cert. denied, 514 U.S. 1082 (1995); *United States* v. *Stillwell*, 900 F.2d 1104, 1106 (7th Cir.), cert. denied, 498 U.S. 838 (1990).

this case the first to rely on a target property's coverage by an out-of-state insurer.[6] The government also has claimed that an automobile was "used in an activity affecting" interstate commerce because it carried a bottle of out-of-state orange juice, see *United States* v. *McGuire*, 178 F.3d 203 (3d Cir. 1999), and that magazine subscriptions delivered to a residence, and the employment of a Chilean housekeeper, helped establish the jurisdictional nexus of Section 844(i). See *United States* v. *Montgomery*, 815 F. Supp. 7, 11 n.6 (D.D.C. 1993).

The absurdity of such interpretations appears even more clearly upon recalling that the jurisdictional element of Section 844(i) applies to arson of personal property as well as real property. If the receipt of utilities, purchase financing by an out-of-state lender, and insurance coverage are sufficient to make a federal crime out of any damage or destruction involving fire or various explosive materials, then a wide range of petty vandalism also violates Section 844(i). Many items of personal property consume interstate utilities, are financed by out-of-state lenders, and are insured through homeowners' policies or credit-card-based purchase replacement policies. Shooting out a television picture tube (gunpowder being an explosive, see 18 U.S.C. § 844(j)) would be a federal crime. The television would be "used in an activity affecting commerce" if it consumed electricity some of which was generated out of state, was purchased using credit financed by an out-of-state bank, and was insured. Similar considerations would federalize damage or destruction of gas barbecue grills or rechargeable electric razors. Like the Seventh Circuit's application of Section 844(i) in this case, these applications are, at

[6] See, *e.g.*, *Vogel*, 1994 WL 556994, at *8; *United States* v. *Moore*, 25 F.3d 1042 (table), 1994 WL 251174, at *3 (4th Cir. June 10, 1994), cert. denied, 514 U.S. 1102 (1995).

best, constitutionally doubtful under the principles enunciated in *Lopez*.

The terms of Section 844(i) certainly do not contemplate such folly, much less compel it. "An evidentiary standard for finding 'use' that is satisfied in almost every case" — the practical effect of the Seventh Circuit's application of the interstate commerce element of Section 844(i) — "does not adhere to the obvious congressional intent," manifested by the plain language of Section 844(i), to require something "more" than simple arson "to trigger the statute's application." *Bailey*, 516 U.S. at 144. To the contrary, by straining to include private residences, the court of appeals effectively excised the jurisdictional element from the statute, and its judgment therefore should be reversed. *Ibid.*; *Ratzlaf*, 510 U.S. at 140-141.

5. This Court's prior analysis of the text of Section 844(i) fully supports interpreting that provision to require more than the mere incidents of homeownership in order to extend federal jurisdiction to arson. In *Russell* v. *United States*, 471 U.S. 858 (1985), the Court, addressing only the construction of Section 844(i) rather than its constitutionality, held that Section 844(i) applied to the arson of a "two-unit apartment building that is used as rental property." *Id.* at 858, 862. The Court explained that the "rental of real estate" — a commercial transaction between landlord and tenant — was an "'activity' that affects commerce" within the meaning of the statute. *Id.* at 862.

Crucially, the Court declined the government's invitation to hold that "the use of out-of-state gas to heat the building petitioner attempted to burn established that it was used in an activity affecting interstate commerce." Brief for the United States at 16, *Russell* v. *United States*, No. 84-495. That had been the rationale of the district court. See 563 F. Supp. 1085, 1086 (N.D. Ill. 1983). But this Court would not go so far. Rather, it rested its decision on an ***active*** employment of the property in a commercial context — as the subject of rental transactions with residential tenants. That emphasis is correct

now as it was then and, unlike some observations in *Russell* that were unnecessary to the statutory holding (see pp. 37-38, *infra*), is consonant with the constitutional analysis in *Lopez*.

C. The Legislative History Of Section 844(i) Does Not Reflect Congressional Intent To Federalize Arson Of A Private Residence

The legislative history of Section 844(i) confirms that the statute does not reach arson of private residences. The committee report described Section 844(i) as "a very broad provision covering substantially all business property." H.R. REP. NO. 91-1549, at 70; see also *Russell*, 471 U.S. at 861.[7] Reaching "substantially" all business property suggests that ***not*** all business property falls with the statute's scope. The Judiciary Committee thus envisioned that even some business property — such as "business" property that was dormant or abandoned — would not be protected by the statute. That, in turn, confirms (in accord with common sense) that even some property that might be characterized in the abstract as "business" property rather than "residential" property is not "***used*** in an activity affecting" interstate commerce within the meaning of Section 844(i). Some property that once was "business" property is no longer "used" at all, or has been converted to private residential use.

Although the Committee broadened the coverage of Section 844(i) in response to concerns about coverage for various types of public buildings, there is no sign that the Committee envisioned that Section 844(i) would encompass private residences. Private residences do not fall within its description of the statute's coverage of "substantially all business property," and were not even mentioned in the Report. The question of federally proscribing the bombing of a private residence arose in both committee and floor debate, but every time the possibility was raised it was rejected. See pp. 2-4, *supra*. Indeed,

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[7] Having quoted this passage, this Court inexplicably dropped the word "substantially" in paraphrasing the legislative history. 471 U.S. at 862.

Chairman Celler stated with unmistakable clarity that "the mere bombing of a private home * * * would not be covered because of the question whether the Congress would have the authority under the Constitution." 116 CONG. REC. 35,359 (1970). This Court need not and should not interpret Section 844(i) to cover private homes "when responsible congressional committees and leaders, in managing a bill, have told Congress that the bill will not reach that which the Act is invoked in this Court to cover." *United States* v. *Five Gambling Devices*, 346 U.S. 441, 449 (1953) (plurality opinion of Jackson, J.).

Notably, Title XI ***repealed*** a prior statutory provision under which explosives used to bomb a "property used for * * * residential * * * objectives" were presumed to have traveled in interstate or foreign commerce. 18 U.S.C. § 837(c) (1960) (repealed by Pub. L. No. 91-452, § 1106(b), 84 Stat. 956 (1970)). Constitutional concerns motivated the repeal, see p. 3, *supra*, and no reference to "residential" uses or objectives carried over into Section 844(i).

The legislative history is equally clear that the Anti-Arson Act of 1982 did not expand the scope of Section 844(i)'s application to arson of residential properties. Chairman Rodino explained that the amendment was "***not*** intended to expand Federal jurisdiction over arson offenses generally." 128 CONG. REC. 18,816 (1982) (emphasis added).

The legislative history thus shows that Congress enacted Section 844(i) — designed to protect "substantially all business property" — in the belief that the statute did not reach private residences. In light of this clear evidence of congressional intent ***not*** to federalize arson of a private residence, there is no reason for this Court to deprive the words "used * * * in any activity affecting interstate * * * commerce" of their normal, active, instrumental meaning in order to bring such arson within the scope of Section 844(i).

II. APPLICATION OF SECTION 844(i) TO THE ARSON HERE VIOLATES THE COMMERCE CLAUSE

If this Court concludes that Section 844(i) cannot be construed to exclude the arson of a private residence, the Court must then consider whether the application of the statute in this case in fact comes within Congress's power "[t]o regulate Commerce * * * among the several States." It does not.

The commerce power authorizes federal regulation of only three categories of activity. *Lopez*, 514 U.S. at 558. The first category covers "the use of the channels of interstate commerce" and permits Congress to exclude harmful uses (and products) from those channels. *Ibid.* The second category encompasses "the instrumentalities of interstate commerce, or persons or things in interstate commerce." *Ibid.* And the third category includes "those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce." *Id.* at 558-559.

The government has not contended that application of Section 844(i) to a private residence (or indeed, to most real property) regulates a channel or instrumentality of interstate commerce, see U.S. Br. (Opp.) 6-8, and real property certainly cannot be a thing "in" commerce. Accordingly, as the Seventh Circuit recognized (J.A. 41), the application of Section 844(i) at issue here can be justified, if at all, as a regulation of an "activity that substantially affect[s] interstate commerce."

We explain below that Congress lacks the power to prohibit arson generally, so that the constitutionality of the present application of the statute must depend on satisfaction of a jurisdictional element that appropriately limits the coverage of the statute to particular examples that have the requisite substantial effects. Even if the minimal and attenuated links to interstate commerce relied upon below satisfy the statute as construed by this Court, they do not bring Jones's crime within Congress's commerce power.

A. The Commerce Clause Does Not Authorize General Federal Regulation Of Arson Based On A Crude Aggregation Of The Economic Effects Of That Crime

The Seventh Circuit recognized that the connections between Jones's arson (or the Walker residence) and interstate commerce were insubstantial at best; "pretty slight" overstates the case. See J.A. 40-41. But the Seventh Circuit held that federal law could proscribe Jones's conduct even though that conduct had no substantial relation to interstate commerce. That conclusion flowed from a flawed premise, that arson — and particularly residential arson — is the type of activity that so substantially affects interstate commerce that an individualized inquiry into the nexus with commerce is unnecessary. In effect, by concluding that the federal government could regulate any arson based on the aggregate financial impact of all arson, the Seventh Circuit concluded that the jurisdictional element was largely if not entirely unnecessary. In the view of the court of appeals, a view apparently shared by the government, the jurisdictional element need not be met by factors that establish a substantial effect on interstate commerce.

That is not so. Arson is not the type of conduct that can be aggregated in its effect and then regulated without a substantial jurisdictional nexus. To the contrary, "the *de minimis* character of individual instances arising under [a statute enacted under the commerce power] is of no consequence" — and so will permit federal regulation — ***only*** "where a general regulatory statute bears a substantial relation to commerce." *Lopez*, 514 U.S. at 558 (quoting *Wirtz*, 392 U.S. at 197 n.27). Section 844(i), however, is not "an essential part of" any such "larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity" — *i.e.*, arson — were regulated. *Lopez*, 514 U.S. at 561. Any substantial effect on interstate commerce must appear through the jurisdictional element, or not at all.

1. *"Substantial Effects" On Interstate Commerce Of A Noncommercial Activity Such As Arson Cannot Be Established Through Aggregation*

The Seventh Circuit held that federal regulation could extend to residential arson because such arson, added together, might have a significant aggregate effect on interstate services including natural gas, insurance, and mortgages. J.A. 42-44. The Seventh Circuit's alternative basis for upholding the regulation of residential arson was the interstate "character" of the "residential housing industry," based on homeowners' consumption of such services. J.A. 42.

Under that reasoning, almost any intrastate conduct could be federally regulated by virtue of our universal immersion in a modern economy. But such an "excessive regard for the unifying forces of modern technology" would violate a most fundamental premise of our constitutional federalism: "[t]he interpenetrations of modern society have not wiped out state lines" and do not permit wholesale "inroads upon our federal system." *Polish National Alliance* v. *NLRB*, 322 U.S. 643, 650 (1982) (Frankfurter, J.). The limitless conception of the commerce power expressed by the Seventh Circuit and the government does not accord with this Court's jurisprudence.

a. Congress's authority to regulate interstate commerce itself is plenary, see *Gibbons*, 22 U.S. (9 Wheat.) at 197, but its Commerce Clause authority over intrastate conduct is limited. *Lopez*, 514 U.S. at 557. The commerce power extends only to "those activities intrastate which so affect interstate commerce or the exertion of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce." *Id.* at 555 (quoting *Darby*, 312 U.S. at 118, which cited *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819)). The only reason that Congress has power, under a grant permitting it to "regulate Commerce * * * among the several States," to "provide for regulation of

activities not themselves interstate commerce, but merely 'affecting' such commerce," is that "in certain fact situations" federal "regulation of purely local and intrastate commerce" may be 'necessary and proper' to prevent injury to interstate commerce." *Polish National Alliance*, 322 U.S. at 652 (Black, J., concurring). See U.S. CONST. art. I, § 8, cl. 18; *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U.S. 219, 231-232 & n.11 (1948); *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 584-585 (1985) (O'Connor, J., dissenting); see also 1 L. TRIBE, AMERICAN CONSTITUTIONAL LAW 812-814 & n.23 (3d ed. 2000); Barnett, *Necessary and Proper*, 44 UCLA L. REV. 745, 764-769 (1997).

This expanded power does not allow Congress to regulate absolutely anything that might have a financial impact on some thread of interstate commerce. As this Court has recognized, "[t]he 'affecting commerce' test was developed * * * to define the extent of Congress's power over purely intrastate ***commercial*** activities that nonetheless have substantial interstate effects." *United States* v. *Robertson*, 514 U.S. 669, 671 (1995) (emphasis added). Thus, "substantial effects" analysis applies only to "economic activity." *Lopez*, 514 U.S. at 560.

As a "necessary and proper" inquiry suggests, the substantial effect on commerce is a qualitative test of relationship, not a mere adding-up of costs. See 1 L. TRIBE, *supra*, at 819. The "activities that substantially ***affect*** interstate commerce" are "activities having a substantial ***relation*** to interstate commerce." *Lopez*, 514 U.S. at 558-559 (emphasis added).

b. In some circumstances, federal regulation of intrastate activity may be justified on the ground that a class of regulated activities in the aggregate has a substantial effect on interstate commerce, although the effects of a specific instance of conduct are minimal. The aggregation principle means that the "substantial effect" perhaps need not be ***quantitatively*** large in every case so long as ***qualitatively*** the effect is closely connected to interstate commerce and to the regulated activity. But

transparently insubstantial connections with commerce — such as the passive receipt of utility service, or the existence of a mortgage or insurance — will not suffice, no matter what their aggregated dollar value.

Not every type of conduct can be freely aggregated; if it could, the aggregation practice would permit an easy end-run around the "substantial effects" limitation. Just as this Court has limited "substantial effects" analysis to "economic activity," *Lopez*, 514 U.S. at 560, it has limited the use of aggregation to federal "regulation[] of [intrastate] activities that arise out of or are connected with a ***commercial transaction***." *Id.* at 561 (emphasis added); see also 1 L. TRIBE, *supra*, at 820-821. Congress may regulate individual instances of intrastate "economic activity that might, through repetition elsewhere, substantially affect * * * interstate commerce," but it may not rely on the aggregation principle to regulate ***noncommercial*** intrastate conduct that lacks a demonstrably substantial relation to interstate commerce. *Lopez*, 514 U.S. at 567. In order to aggregate the effects on commerce of individual instances of an activity, the instances must be "meaningfully part of some greater whole." *United States* v. *Hickman*, 179 F.3d 230, 232-233 (5th Cir. 1999) (en banc affirmance by an equally divided court) (Higginbotham, J., dissenting), petition for cert. filed, 68 U.S.L.W. 3178 (Sept. 16, 1999) (No. 99-464). And that greater whole, in the context of regulation of interstate commerce, arises from the market significance of intrastate commercial activity.

It makes perfect sense to "view[]" commercial transactions "in the aggregate," *Lopez*, 514 U.S. at 561, as those transactions operate within markets that either are interstate or may be affected by adjacent, interstate markets. Although "a determination whether an intrastate activity is commercial or noncommercial may in some cases result in legal uncertainty," that

uncertainty is a necessary byproduct of constitutional limits on the commerce power. *Id.* at 566.[8]

c. The limitations on the aggregation practice reflect the relation of that practice to the Necessary and Proper Clause. In applying that Clause to the commerce power, this Court has permitted regulation of intrastate conduct under an aggregation theory ***only*** where successful protection of interstate commerce required uniform, nationwide regulation of the intrastate conduct — regulation that no State could provide within its borders alone.

This Court has found this standard satisfied in two, and only two, related sets of circumstances, each of which has involved some form of commercial activity. First, intrastate conduct falls within Congress's authority where interstate and intrastate activities are so "commingled" or interdependent that the effective regulation of the former requires regulation of both. *E.g.*, *North American Co.* v. *SEC*, 327 U.S. 686, 700 (1946); *Wickard*, 317 U.S. at 119, 123-125; *Wrightwood Dairy*, 315 U.S. at 119; *Darby*, 312 U.S. at 121. Arson of private homes and arson in interstate commerce are not so "commingled" or causally interdependent that it is necessary to regulate the former in order to regulate effectively the latter. Effective

[8] "Commercial" activity of course embraces more than mere "commerce," which includes the exchange of property or services and transportation (which is essential to exchange). See *Gibbons*, 22 U.S. (9 Wheat.) at 193. Commercial activity extends to a broader "realm of commerce" (*Lopez*, 514 U.S. at 583 (Kennedy, J., concurring)) that includes a range of incidents to commerce proper, such as the production of products and organization of services for exchange and a wide variety of other activities and relationships that contribute to the pursuit of an interest through the medium of exchange. Commercial activity need not be undertaken on behalf of capital; labor, in organizing to sell its services, engages in a commercial activity that squarely and powerfully affects commerce itself. And commercial activity in this sense need not be for profit; the fund-raising and other enterprises of many groups founded on a common interest of ideology or morality are as commercial as the identical activities motivated by common trade interests or for personal profit.

regulation of arson in interstate commerce requires just that, and no more — it does not require that Congress also federalize arson of private residences or other property that is not actively employed in interstate commerce or in a commercial undertaking that affects interstate commerce.

Intrastate activities may also be regulated if, taken as a class, they bear "such a close and substantial relation" to interstate commerce that their regulation is "essential or appropriate" to protect interstate commerce against injury or disruption, as from unfair competition or a labor stoppage. *Shreveport Rate Cases (Houston, E. & W. Tex. Ry.* v. *United States*), 234 U.S. 342, 351 (1914); see also, *e.g.*, *Darby*, 312 U.S. at 118-119; *Santa Cruz Fruit Packing Co.* v. *NLRB*, 303 U.S. 453, 466-467 (1938); *Jones & Laughlin*, 301 U.S. at 37. But these cases, too, involved commercial activities. Noncommercial intrastate conduct does not fall within this class of activities simply because its aggregate financial impact is substantial. Cf. J.A. 42.

The Court appropriately restricted the aggregation device to commercial activities in light of what may be "necessary and proper" to regulate interstate commerce. Unlike noncommercial conduct, intrastate commercial activities frequently are "nationally significant in their cumulative effect, such as altering the supply-and-demand relationships in the interstate commodity market." *Hodel* v. *Virginia Surface Mining Ass'n*, 452 U.S. 264, 307 (1981). And in-state commercial activities may directly limit interstate commerce, as when some participants in commerce, because of their race, cannot purchase lodging or other accommodation while traveling. See *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241 (1964); *Katzenbach* v. *McClung*, 379 U.S. 294 (1964).

Commercial activities also pose the risk of competitive regulation among the States, which might lead to a regulatory "race to the bottom" that could injure interstate commerce by flooding it with products produced under detrimental condi-

tions. See *Darby*, 312 U.S. at 122; *Virginia Surface Mining*, 452 U.S. at 281-282. Moreover, the Dormant Commerce Clause prevents any single State from protecting its home industries by forbidding the entry of goods from States with less salutary industrial standards.[9] As a result, Congress can and has regulated the incidents and byproducts of manufacturing and mining to ensure that interstate commerce cannot become the vehicle for this socially injurious form of competition. *E.g.*, *Virginia Surface Mining*, 452 U.S. at 279-282.

d. The effects of arson cannot be aggregated for purposes of constitutional analysis — and the jurisdictional element overlooked or downgraded into insignificance — for a simple reason. Arson as defined in Section 844(i) — mere damage or destruction by fire or explosives — is not commercial conduct. Arson cannot be characterized as an activity that "arise[s] out of or [is] connected with a commercial transaction" (*Lopez*, 514 U.S. at 561) that, although intrastate, has a discernible and definable connection with an interstate market or other interstate commercial process. The mere destruction of property by fire "has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." *Ibid.* Burning a building or other property does not involve any economic transaction or exchange. See *Lopez*, 514 U.S. at 559, 561. Cf. *McClung*, 379 U.S. 294; *Heart of Atlanta Motel*, 379 U.S. 241. Arson also does not involve the manufacture or production of a commodity that may be exchanged in interstate commerce or that may compete with such products. See *Lopez*, 514 U.S. at 559-560. Cf. *Wickard*, 317 U.S. 111 (regulating wheat); *Virginia Surface Mining*, 452 U.S. 264

[9] See Stern, *The Commerce Clause and the National Economy, 1933-1946*, 59 HARV. L. REV. 645, 647 (1946); Stern, *The Commerce Clause and the National Economy, 1933-1946, Part II*, 59 HARV. L. REV. 883, 883 (1946). Robert L. Stern, who litigated many of the New Deal-era Commerce Clause cases on the government's behalf, see Stern, *supra*, 59 HARV. L. REV. at 645 n.*, has explained that the government relied on precisely this rationale to defend federal regulation of intrastate activities in cases such as *Darby*. Stern, *supra*, 59 HARV. L. REV. at 887.

(regulating mining). And because one arson generally bears no economic relation to another, and there is no interstate market for arson, there is no causal interdependence or other connection between arson nationwide that would support aggregating — and prohibiting — them all. Neither arson nor arsonists (as broadly defined by Section 844(i)) "have a commercial character, and neither the purposes nor the design of the statute have an evident commercial nexus." *Lopez*, 514 U.S. at 580 (Kennedy, J., concurring).

Across-the-board federal regulation of arson — defined so generally as to include residential property or other property not actually in commercial use — cannot be upheld as necessary and proper to protect interstate commerce against disruption. No effects on interstate commerce of a residential arson, such as possible interruption of natural gas service to one recipient, exceed the bounds of what the laws of a single State can and do protect. Likewise, there is no prospect of a race to the bottom among States to loosen their arson laws in order to attract more arsonists. One State's failure to enforce arson laws (or its failure to enact an arson law as stringent as that of a neighboring State) will hurt that State, not other States or the commerce among them. Because Section 844(i) cannot be said to regulate conduct with a substantial effect on interstate commerce by virtue of the aggregation principle, the jurisdictional element of Section 844(i) remains the focus of substantial effects analysis for that statute.

The Seventh Circuit approached Section 844(i) as if it were part of a greater regulation of the real estate market, or of the residential real estate market. See J.A. 42-44. The court of appeals misapplied this Court's statement in *Russell*, where, in holding, unremarkably, that the "rental of real estate" was an "activity affecting commerce" within the meaning of Section 844(i), the Court also observed that "[t]he congressional power to regulate the class of activities that constitute the rental market for real estate includes the power to regulate individual activity with that class." 471 U.S. at 862. With respect, how-

ever, the latter observation, not made in the context of a constitutional challenge to the statute, misstates the nature of Section 844(i).

Section 844(i) is not part of any broader scheme of federal regulation of the "rental market for real estate." To the contrary, Section 844(i), for all intents and purposes, stands alone as a simple prohibition of a crime that Congress found independently offensive — a crime that, unlike an "intrastate extortionate credit transaction[]," *Lopez*, 514 U.S. at 559 (citing *Perez* v. *United States*, 402 U.S. 146 (1971)), is not itself a "commercial transaction" or bound up with one (see *id.* at 561). ***All*** that Section 844(i) regulates is setting property on fire (or trying to do so). Whatever federal regulation, beyond the application of the antitrust laws (see *McLain* v. *Real Estate Board*, 444 U.S. 232 (1980)), might permissibly apply to the conduct of the real estate business, rental or otherwise, a broad application of Section 844(i) to wholly noncommercial conduct cannot be justified as necessary to preserve the integrity of a regulatory scheme that does not exist.

Only a limitation of federal regulation to certain property closely connected to interstate commerce could conceivably bring the prohibition in Section 844(i) within the scope of a regulation of commerce. But the arson at issue in this case — arson of a private residence, not used in business or for any other broadly commercial purpose — cannot rationally be characterized as "commercial" conduct even then. See Nelson & Pushaw, *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control Over Social Issues*, 85 IOWA L. REV. 1, 147 (forthcoming 1999) (copies lodged with the Clerk of the Court). If the damage or destruction of private residences is sufficiently "commercial" to support broad-scale regulation, then every sidewalk mugging, purse-snatching, and barroom brawl also falls within Congress's reach.

2. *Fundamental Principles Of Federalism And Enumerated Powers Preclude The Use Of Aggregation To Undercut The Constitutional Role Of The Jurisdictional Element In This Case*

Federal regulation of arson is suspect for reasons that render the use of aggregation to establish "substantial effects" still more inappropriate than with other noncommercial conduct. Federal regulation of arson impinges on an area of traditional state regulation, so that the Court should be particularly vigilant to keep the intrusion within permissible bounds. A crude use of aggregate financial impact to justify the application of Section 844(i) here would supply a rationale for transforming the Commerce Clause into the means for federal regulation of all or nearly all local crimes. That transformation disregards not only the federalism that informs the doctrine of enumerated powers, but the structure of the Constitution itself.

a. As this Court repeatedly has explained, "[u]nder our federal system, the 'States possess primary authority for defining and enforcing the criminal law.'" *Lopez*, 514 U.S. at 561 n.3 (quoting *Brecht* v. *Abrahamson*, 507 U.S. 619, 635 (1993), and *Engle* v. *Isaac*, 456 U.S. 107, 128 (1982)). Although the States can legislate in any field, the "Constitution * * * withhold[s] from Congress a plenary police power." *Id.* at 566.

From the earliest days of the Republic, it has been "clear[] that Congress cannot punish felonies generally." *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 428 (1821). The Commerce Clause empowers Congress to regulate interstate and foreign commerce, and that regulation may include criminal proscriptions and penalties. But the commerce power, although broad within its defined sphere, "is subject to outer limits." *Lopez*, 514 U.S. at 557. Certain spheres of conduct do not constitute commercial activity and thus cannot be regulated directly and generally by Congress in an exercise of the commerce power. These areas include public education, child-rearing, marriage and divorce, and violent crime. See *id.* at 564-565.

Except to the extent that it may be bound up with a commercial activity, arson is a traditional crime falling within the heartland of traditional "criminal law enforcement," an area in which "States historically have been sovereign." *Lopez*, 514 U.S. at 564. The arson of private residences is a felony in every State, and has been since before Independence. See Poulos, *supra*, 51 MO. L. REV. at 342-344 & nn.221, 223-262; Panneton, *supra*, 23 AM. CRIM. L. REV. at 151; see generally A. CURTIS, A TREATISE ON THE LAW OF ARSON (1936). There is no indication that States are unwilling or unable to enforce their arson laws. See Ashdown, *Federalism, Federalization, and the Politics of Crime*, 98 W. VA. L. REV. 789, 799 (1996). Applying the aggregation device to Section 844(i) thus would result in a broad intrusion on a subject of traditional and thorough state regulation. That weighs heavily against a conclusion that extending federal power over all or substantially all arson is necessary and proper to protect interstate commerce. See *Printz* v. *United States*, 521 U.S. 898, 923-924 (1997); see also Engdahl, *Sense and Nonsense About State Immunity*, 2 CONST. COMM. 93, 100-101 (1985).[10]

b. In addition, the use of aggregation analysis in this case rests on a rationale that effectively would grant Congress plenary authority over every activity in modern life. This Court has made clear that, where Congress seeks to regulate a noncommercial activity in an area of traditional state regula-

[10] The potential displacement of state authority is sweeping. The savings clause applicable to Section 844(i), 18 U.S.C. § 848, is a sobering reminder that, if Congress can federalize all or virtually all arson (or any other crime), it also could entirely ***preempt*** state control of that crime. Even without preemption, the federalization of local crimes "displace[s] state policy choices" on what activities to prohibit, what substantive and procedural rights to grant criminal defendants, and what punishments to mete out. *Lopez*, 514 U.S. at 561 n.3. For example, the death penalty provided for some violations of Section 844(i) effectively nullifies the choice of thirteen States and the District of Columbia to ban capital punishment for local crimes. See Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135, 1166 & n. 171 (1995).

tion, its rationale for doing so must not be so broad as "to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *Lopez*, 514 U.S. at 567. But if the federal government can regulate a common-law crime — committed against immovable property within a State, where that property is not demonstrably used to advantage in any commercial activity, but rather is used in that most local of pursuits, private residence — simply because of the aggregate economic effect of thousands of sporadic and unrelated residential arson, then Congress in fact possesses the police power denied it by the Framers.

If aggregation for the purpose of demonstrating a substantial effect on interstate commerce consists of no more than adding up the costs of an activity, the aggregate financial impact of any garden-variety criminal conduct is significant. Thefts impede the flow of currency or require replacement of stolen property. Violent crime imposes medical costs and decreases worker productivity. Graffiti increases the market demand for paint (and paint remover). Indeed, given the substantial economic impact of other forms of noncommercial behavior such as exercise (see Krucoff, *Get Moving; Stop Trying To Be Thin and Start Trying To Be Healthy*, WASH. POST., Aug. 12, 1997, at Z10 ($4 billion annual medical costs would be saved if 25% of sedentary people exercised regularly)), or insomnia (see 140 CONG. REC. 14,211 (1994) (Sen. Hatfield) (estimating annual economic impact of insomnia at $92.5-107.5 billion)), Congress could presumably regulate jogging and sleeping under the rationale of the Seventh Circuit.

And if an arson prohibition may be justified by the "interstate * * * character" of the "residential housing industry," so could nationwide zoning regulations (limited, perhaps, to structures that received utilities from interstate systems). Indeed, any number of daily activities involve the same use and consumption of goods and services that move in interstate

commerce, and thus might be subject to federal regulation on the same basis.[11]

That cannot be possible under the Commerce Clause. That Clause is not a subtle grant of a plenary police power. That provision speaks only of "commerce," and only of such commerce involving more than one State or sovereign nation. See Redish & Drizin, *Constitutional Federalism and Judicial Review: The Role of Textual Analysis*, 62 N.Y.U. L. REV. 1, 41 (1987). To extract a general police power from that limited grant would flatly disregard the stated intentions of the Framers, who envisioned that "[t]he powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State." THE FEDERALIST NO. 45, at 292-293 (J. Madison) (C. Rossiter ed. 1961).

c. Reading the Commerce Clause to permit federal criminal regulation over any behavior with aggregate economic significance — that is, over any crime at all (see generally R. POSNER, ECONOMIC ANALYSIS OF LAW 237-270 (5th ed. 1998); Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968)) — also would improperly eradicate the limitations on Congress's enumerated powers addressing crime and intrastate violence. See *Railway Labor Executives' Ass'n* v. *Gibbons*, 455 U.S. 457, 468-469 (1982). A view that the most basic and traditional crimes may be regulated in full by the federal government cannot be reconciled with the Constitution's grant of congressional authority over crime in only four

[11] See *McGuire*, 178 F.3d at 210 (noting that "driving a few blocks to pick up one's children (consumption of gasoline refined from foreign oil, and wear and tear on vehicle manufactured in another state or country) or eating dinner in front of one's own television set (consuming food and beverages from outside of state or country, as well as decisions on how to spend hundreds of millions of advertising dollars)" would fall within federal authority under this overbroad rationale).

discrete areas.[12] And that view also would render superfluous Article IV, Section 4, which sets out the limited role for Congress in regulating local crime within the States: "[t]he United States shall * * * protect each of [the States of this Union] * * * on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence." By its plain terms, the Domestic Violence Clause requires a proper request from a State before the federal government may act against intrastate violence.[13] The existence of these powers should create a strong presumption against the derivation of additional powers to create federal crimes. Under these circumstances, a regulation of a crime like arson surely cannot be justified as a regulation of commerce without proof of substantial effect on commerce in an individual case.

d. The contemporaneous views of the legislative and executive branches that Section 844(i) required a jurisdictional element to be constitutional reinforce the conclusion that Section 844(i) can satisfy the substantial effects test only through application of an individualized jurisdictional nexus, and not through aggregation of the effects of arson as a whole. The structure of the statute, along with the legislative history discussed above (at pp. 2-4), shows that Congress and the Executive Branch both believed that Congress lacked the constitutional power to regulate arson without including a jurisdictional element, and lacked the constitutional power to regulate arson of private homes at all. That assessment —

[12] See U.S. CONST. art. I, § 8, cl. 6 (power to punish counterfeiting of United States securities and coin); *id.* cl. 10 (power to "punish Piracies and Felonies committed on the high Seas and Offences against the Law of Nations"); *id.* cl. 17 (plenary power over seat of federal government and federal enclaves); *id.* art. III, § 3 (power to punish treason).

[13] See W. RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 299 (2d ed. 1829); 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES ¶ 1819, at 684-685 (1833 ed.) (Fred. B. Rothman & Co. 1991); Bybee, *Insuring Domestic Tranquility*: Lopez, *Federalization of Crime, and the Forgotten Role of the Domestic Violence Clause*, 66 GEO. WASH. L. REV. 1, 3-4 (1997).

which reflects the view of the co-equal branches at the time of the enactment of Section 844(i) that their power was ***limited*** beyond what is contended here — warrants substantial consideration by this Court. See *City of Boerne* v. *Flores*, 521 U.S. 507, 535-536 (1997).

* * * * *

To deem the arson of a private home a "commercial" or "economic" activity would divest the terms of "any real limits," *Lopez*, 514 U.S. at 565, and would make the Commerce Clause into the source of the general police power which the Constitution forbids to Congress. See *id.* at 567. Accordingly, arson of a private residence must be treated as a noncommercial activity, which cannot be regulated on the ground that, in the aggregate, it has a substantial economic effect on interstate commerce. *Id.* at 566-567. Rather, the constitutionality of Section 844(i) as regulation of an activity that substantially affects interstate commerce depends on the results of the "case-by-case inquiry" triggered by the statute's jurisdictional element. *Id.* at 561-562.

B. The Jurisdictional Element In Section 844(i) Precludes Regulation Of Intrastate Conduct That, Like The Conduct Here, Does Not Substantially Affect Interstate Commerce

The inclusion of a jurisdictional element in a federal statute may permit Congress to regulate activities that otherwise lack "a substantial relation to interstate commerce" because they do not in general "substantially affect interstate commerce." *Lopez*, 514 U.S. at 559. A statute that contains an "express jurisdictional element which * * * limit[s] its reach to a discrete set of" intrastate activities "that additionally have an explicit connection with or effect on interstate commerce" may be constitutionally applied to a particular instance of that "discrete set" of activities. *Id.* at 562. But a jurisdictional element does not permit regulation outside the three categories of activity identified in *Lopez*. Indeed, when inartful drafting prevents a jurisdictional element from winnowing the constitutional

applications from the impermissible ones, this Court will not permit the statute to be applied to conduct that does not have a ***constitutional*** connection with interstate commerce. See generally *Five Gambling Devices*, 346 U.S. at 446-452 (plurality opinion). Cf. *Bass*, 404 U.S. at 350.

1. The role of the courts in applying statutes that rely for their constitutionality on jurisdictional elements contrasts sharply with the far more limited judicial role when no jurisdictional element is necessary. When a statute legitimately regulates an ***entire*** class of activities through the Commerce Clause, courts may not "excise as trivial, individual instances of the class." *Perez*, 402 U.S. at 153 (quoting *Wirtz*, 392 U.S. at 193). The only question in such cases is whether the class of activities falls "within the reach of the federal power." *Darby*, 312 U.S. at 120-121.

But where a class of activities can be regulated by the federal government only with the safeguard of the "case-by-case" scrutiny afforded by a jurisdictional nexus to interstate commerce, see *Lopez*, 514 U.S. at 561-562, the role of the Court "differs significantly." *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186, 192 n.12 (1974). Inclusion of a jurisdictional element signals that at least some instances of the regulated conduct lack a sufficient connection to interstate commerce to fall within the commerce power, thus requiring careful judicial scrutiny to keep the statute's application within constitutional limits. See *North American*, 327 U.S. at 699. In such cases, Congress has "left it to the courts to determine whether the intrastate activities have the prohibited effect" on interstate commerce necessary for federal regulation. *Darby*, 312 U.S. at 120; see also, *e.g.*, *Wirtz*, 392 U.S. at 192. Because only those intrastate activities that "substantially affect" interstate commerce fall within the commerce power, *Lopez*, 514 U.S. at 559, it therefore is the function of the courts, "through case-by-case inquiry," *id.* at 561-562, to confine the application of the statute to those instances that substantially affect interstate commerce. See *Bass*, 404 U.S. at 350 (setting

aside conviction because the lower courts had not required "proof of some interstate commerce nexus in each case").

Accordingly, application of a statute with a jurisdictional element to particular conduct requires stricter judicial scrutiny, and a stronger showing of an effect on interstate commerce, than application of a statute regulating an entire class of activities found by Congress to have a substantial effect on interstate commerce. In cases like this one, there is no broad congressional finding — express or implicit — to which a court might defer.[14] See Lopez, 514 U.S. at 562-563. Wirtz, 392 U.S. at 192-193; *Darby*, 312 U.S. at 120-121; see also, *e.g.*, D. ENGDAHL, CONSTITUTIONAL FEDERALISM § 3.09, at 39 (1987). The nexus with interstate commerce established by the satisfaction of the jurisdictional element in a particular case must stand or fall on its own.

2. A statute cannot be constitutionally applied if the nexus with interstate commerce in a particular case does not satisfy the jurisdictional element chosen by Congress. As this Court pointed out in *Russell*, whatever the scope of Congress's power to enact anti-arson legislation, "[b]y its terms, * * * the statute only applies to property that is 'used' in an 'activity' that

[14] When Congress seeks to regulate intrastate conduct, its justification must be clear and apparent. *Polish National Alliance*, 322 U.S. at 652-653 (Black, J., concurring) (citing *City of Yonkers* v. *United States*, 320 U.S. 685, 690 (1944); see also, *e.g.*, Gardbaum, *Rethinking Constitutional Federalism*, 74 TEX. L. REV. 795, 814 (1996). Congressional findings may show that a particular regulated activity is sufficiently related to interstate commerce to fall within the commerce power even though the relationship is not "visible to the naked eye." *Lopez*, 514 U.S. at 563. But Congress may not, "under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government." *M'Culloch*, 17 U.S. (4 Wheat.) at 423. Close scrutiny of supporting findings is especially appropriate where the intrusion upon a matter of state concern is apparently limitless, while the connection to an enumerated power is exceptionally tenuous. See M. REDISH, THE CONSTITUTION AS POLITICAL STRUCTURE 56-57 (1995). Here, no congressional findings support extending a federal arson prohibition to private residences or other buildings not currently in commercial use.

affects commerce." 471 U.S. at 862. Congress thus narrowed the field of connections with interstate commerce that may make the application of *this* statute constitutional (or may fail to do so). Courts can no more use constitutional theory to broaden a statute beyond its text than they can permit a statute to exceed the limits of congressional power. Thus, if Section 844(i) must be construed to apply to at least some private residences, but the existence of utility service, a mortgage, and insurance do not constitute "use[s]" of the property within the statutory terms, the statute cannot be constitutionally applied to this case.

But even if the factual nexus ***does*** satisfy the element as written, the application nonetheless may not be constitutional if the individual circumstances do not show a substantial effect on interstate commerce. This Court has never held that a jurisdictional element might be satisfied by intrastate conduct with only an attenuated or *de minimis* effect on interstate commerce. The reason for that is clear: Congress may not "use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities." *Lopez*, 514 U.S. at 558 (quoting *Wirtz*, 392 U.S. at 197 n.27).

Although the Court has changed its view of what types of effects are too attenuated, compare, *e.g.*, *Copp Paving*, 419 U.S. 186 (1974) with *United Leather Workers' Int'l Union* v. *Herkert & Meisel Trunk Co.*, 265 U.S. 457 (1924), its recognition and enforcement of limits on the causal chain have remained intact. In repeating Justice Cardozo's warning, this Court recognized that "[t]here is a view of causation that would obliterate the distinction between what is national and what is local in the activities of commerce." *Lopez*, 514 U.S. at 567 (quoting *A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495, 554 (1935) (Cardozo, J., concurring)). Some limit on the degree of causal attenuation is necessary if there is to be any distinction between the truly national and the truly local, *Lopez*, 514 U.S. at 567, as this Court repeatedly assures that there is. *Id.* at 566-568; see also, *e.g.*, *Jones & Laughlin*, 301 U.S. at 30.

It is not only logical, but necessary to the preservation of a federal system, that the satisfaction of a jurisdictional element demonstrate as qualitatively substantial an effect on commerce in the particular instance as a regulated activity would have to manifest in general in order to support an exercise of the commerce power in the absence of a jurisdictional element. If nothing more were required for exercise of the commerce power than a demonstration of ***some*** nexus between regulated intrastate conduct and interstate commerce, Congress could regulate all activities of modern life. See 1 TRIBE, *supra*, at 831 n.29.

3. The Seventh Circuit recognized that the connections between interstate commerce and the regulated conduct (and subject residence) in this case did not demonstrate a substantial effect on interstate commerce. J.A. 41. The connections between Jones's crime and interstate commerce are trivial at best. The existence of utility service, a mortgage, and insurance are widespread incidents of real (and even personal) property. See pp. 23-25, *supra*. The connections between the property and interstate commerce — much less between the potential effects of the crime and interstate commerce — are remote and insignificant in quality. And the actual effects of the crime were still less significant. The out-of-state company that held a mortgage on the property suffered no loss as a result of the fire, see J.A. 12-14, 17, and there is no evidence that the arson interrupted the property's receipt of out-of-state natural gas, see *id.* at 15-16, 17-18.

If such connections to interstate commerce suffice to support the exercise of federal power under the Commerce Clause, Congress could regulate any crime that resulted in a loss of currency that had been, or would have been, spent in interstate commerce. Because any theft affects commerce in this way, Congress would have plenary power to regulate theft

— as some courts apparently believe.[15] Approving application of a jurisdictional element that may be satisfied by such "distant repercussions" on interstate commerce would transform the run of local concerns into potential subjects of federal regulation. *Schechter Poultry*, 295 U.S. at 554 (Cardozo, J., concurring); *Santa Cruz Fruit Packing*, 303 U.S. at 466; see also *Lopez*, 514 U.S. at 567. That cannot be reconciled with this Court's recognition that the commerce power has enforceable limits. 514 U.S. at 564-565.

4. Even if the effects of arson can be aggregated in the course of deciding whether Congress can regulate any arson at all under the Commerce Clause, the application of Section 844(i) to the arson of a building devoid of commercial activity remains unconstitutional. Where the regulated activity is as far removed from common conceptions of commerce and commercial activity as is the mere arson of a residence, the effect of aggregation is diminished, and the connection between the particular incidence of the conduct and interstate commerce still must carry most of the load in ensuring that federal regulation reaches only activities that "substantially affect" interstate commerce. *Lopez*, 514 U.S. at 559.

Thus, speculative and attenuated connections between conduct and interstate commerce cannot support an exercise of federal power where, as here, the entire class of activities cannot be federally regulated because of an inherent connection with commerce. In-state violence against immovable in-state property — property that has no more to do with interstate commerce than almost any other real property — does not have a substantial effect on interstate commerce even if other arson

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[15] Several courts have upheld application of the Hobbs Act to theft or extortion from small businesses on the grounds that stolen money otherwise might have been spent in interstate commerce. See, *e.g.*, *United States* v. *Zeigler*, 19 F.3d 486, 491-493 (10th Cir.), cert. denied, 513 U.S. 1003 (1994); *United States* v. *Boston*, 718 F.2d 1511, 1516-1517 (10th Cir. 1983), cert. denied, 466 U.S. 974 (1984); *United States* v. *Elders*, 569 F.2d 1020, 1025 (7th Cir. 1978).

might. The nexus between property and its insurance, credit, and utility service is too loose to make damage to that property "substantially affect" interstate commerce. The arson here did not and could not shut down or alter any business. The greatest contemplated effect on interstate commerce seems to be the payment of an insurance claim — a routine and distant effect indeed. There are too many steps between Jones's Molotov cocktail and interstate commerce to support an exercise of federal power here.

* * * * *

The "momentary political convenience" of federalizing state-law crimes too frequently renders the political checks on federal regulation "illusory." *Lopez*, 514 U.S. at 578 (Kennedy, J., concurring); see also AMERICAN BAR ASS'N TASK FORCE ON FEDERALIZATION OF CRIMINAL LAW, THE FEDERALIZATION OF CRIMINAL LAW 2, 15 (1998). It is entirely appropriate, and indeed essential, for this Court to enforce (and reinforce) the structural limits of our federal system rather than to acquiesce in its erosion "by indifference to its maintenance or excessive regard for the unifying forces of modern technology." *Polish National Alliance*, 322 U.S. at 650 (Frankfurter, J.). However it is viewed, the application of Section 844(i) to this case falls outside Congress's power "[t]o regulate Commerce * * * among the several States."

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

DONALD M. FALK
Counsel of Record
SHARON SWINGLE
Mayer, Brown & Platt
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000

Counsel for Petitioner

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In the Supreme Court of the United States

DEWEY J. JONES, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

SETH P. WAXMAN
Solicitor General
Counsel of Record

JAMES K. ROBINSON
Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

MALCOLM L. STEWART
Assistant to the Solicitor General

DAVID S. KRIS
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Section 844(i) of Title 18, United States Code (Supp. IV 1998), prohibits the arson or attempted arson of "any building" that is "used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce." This Court granted certiorari on the following question:

Whether, in light of *United States* v. *Lopez*, 514 U.S. 549 (1995), and the interpretive rule that constitutionally doubtful constructions should be avoided, see *DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988), Section 844(i) applies to the arson of a private residence; and if so, whether its application to the private residence in the present case is constitutional.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Constitutional and statutory provisions involved	2
Statement	3
Summary of argument	10
Argument:	
I. Section 844(i) cannot reasonably be construed to contain a categorical exclusion of owner-occupied private residences	13
A. Congress unambiguously expressed its intent to extend Section 844(i) to the full scope of its authority under the Commerce Clause	13
B. Application of Section 844(i) to petitioner's conduct is consistent both with the text of the statute and with the purpose of the jurisdictional element	18
C. The legislative history of Section 844(i) does not support any categorical exclusion of owner-occupied residential property	25
II. Section 844(i) is constitutional as applied to the facts of this case	32
A. Congress may prohibit intrastate violent conduct committed for non-economic motives, so long as the conduct has a sufficiently direct and significant connection to interstate commerce	32
B. The effects on interstate commerce in this case were specific and concrete	36
C. Section 844(i)'s jurisdictional element ensures that the statute is limited to property, and offenses, having a constitutionally sufficient nexus to interstate commerce	41
Conclusion	47

TABLE OF AUTHORITIES

Cases:	Page
Allied-Bruce Terminix Cos. v. *Dobson*, 513 U.S. 265 (1995)	15, 31
Allstate Ins. Co. v. *Mazzola*, 175 F.3d 255 (2d Cir. 1999)	38
Cheffer v. *Reno*, 55 F.3d 1517 (11th Cir. 1995)	35
Commercial Union Ins. v. *Bituminous Cas. Corp.*, 851 F.2d 98 (3d Cir. 1988)	38
DeBartolo Corp. v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568 (1988)	14, 17
Fry v. *United States*, 421 U.S. 542 (1975)	32
Goldfarb v. *Virginia State Bar*, 421 U.S. 773 (1975)	9
Gulf Oil Corp. v. *Copp Paving Co.*, 419 U.S. 186 (1974)	15
Hoffman v. *Hunt*, 126 F.3d 575 (4h Cir. 1997), cert. denied, 523 U.S. 1136 (1998)	35
Illinois Natural Gas Co. v. *Central Ill. Pub. Serv. Co.*, 314 U.S. 498 (1942)	19
Leary v. *United States*, 395 U.S. 6 (1969)	6
Maryland v. *Wirtz*, 392 U.S. 183 (1968)	42
McLain v. *Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232 (1980)	9, 19
NLRB v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937)	33, 41
NLRB v. *Reliance Fuel Oil Corp.*, 371 U.S. 224 (1963)	15
National Org. for Women, Inc. v. *Scheidler*, 510 U.S. 249 (1994)	35
New York v. *United States*, 505 U.S. 144 (1992)	32
Perez v. *United States*, 402 U.S. 146 (1971)	32, 34, 44, 47
Phoenix Ins. Co. v. *Erie & Western Transp. Co.*, 117 U.S. 312 (1886)	38

Cases—Continued:	Page
Polish Nat'l Alliance v. *NLRB*, 322 U.S. 643 (1944)	15
Russell v. *United States*, 471 U.S. 858 (1985)	*passim*
Russello v. *United States*, 464 U.S. 16 (1983)	27
Rust v. *Sullivan*, 500 U.S. 173 (1991)	16
Scarborough v. *United States*, 431 U.S. 563 (1977)	15, 44
Terry v. *Reno*, 101 F.3d 1412 (D.C. Cir. 1996), cert. denied, 520 U.S. 1264 (1997)	35
Tot v. *United States*, 319 U.S. 463 (1943)	6
United States v. *American Bldg. Maintenance Indus.*, 422 U.S. 271 (1975)	15
United States v. *Bass*, 404 U.S. 336 (1971)	44
United States v. *Darby*, 312 U.S. 100 (1941)	14, 27, 32, 44
United States v. *Dinwiddie*, 76 F.3d 913 (8th Cir.), cert. denied, 519 U.S. 1043 (1996)	35
United States v. *Gonzalez*, 520 U.S. 1 (1997)	18
United States v. *Hicks*, 106 F.3d 187 (7th Cir. 1997)	23, 40
United States v. *Lopez*, 514 U.S. 549 (1995)	*passim*
United States v. *Mennuti*, 639 F.2d 107 (2d Cir. 1981)	24
United States v. *Ramey*, 24 F.3d 602 (4th Cir. 1994), cert. denied, 514 U.S. 1103 (1995)	24
United States v. *Shively*, 927 F.2d 804 (5th Cir.), cert. denied, 501 U.S. 1209 (1991)	24
United States v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1994)	19
United States v. *Stillwell*, 900 F.2d 1104 (7th Cir.), cert. denied, 498 U.S. 838 (1990)	24, 31
United States v. *Wilson*, 73 F.3d 675 (7th Cir. 1995), cert. denied, 519 U.S. 806 (1996)	35
United States v. *Wrightwood Dairy Co.*, 315 U.S. 110 (1942)	33
Wickard v. *Filburn*, 317 U.S. 111 (1942)	33

Constitution and statutes: Page

U.S. Const.:
Art. I, § 8:
Cl. 3 (Commerce Clause) 2
Cl. 18 (Necessary and Proper Clause) 2, 32
Amend. V (Due Process Clause) 6
Anti-Arson Act of 1982, Pub. L. No. 97-298, 96 Stat. 1319:
§ 2(a), 96 Stat. 1319 6
§ 2(b), 96 Stat. 1319 6
§ 2(c), 96 Stat. 1319 6
Freedom of Access to Clinic Entrances Act of 1994, 18 U.S.C. 248 35
Organized Crime Control Act of 1970, Pub. L. No. 91-452, Tit. XI, 84 Stat. 922:
§ 1102, 84 Stat. 958 3
§ 1106(b)(1), 84 Stat. 960 5
Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1961 *et seq.* 35
18 U.S.C. 837(c) (1964) 5, 27
18 U.S.C. 844(e) 6
18 U.S.C. 844(e) (Supp. IV 1998) 18, 19
18 U.S.C. 844(f) 6
18 U.S.C. 844(h)(1) 6
18 U.S.C. 844(i) (Supp. IV 1998) ..... *passim*
18 U.S.C. 844(i) (1970) 3
18 U.S.C. 848 42
18 U.S.C. 922(a) 16
18 U.S.C. 922(g) 44
18 U.S.C. 922(q) (Supp. V 1993) 36
18 U.S.C. 924(c) 3
18 U.S.C. 1952 16
18 U.S.C. 2119 44
18 U.S.C. 2332a(a)(2) (Supp. IV 1998) 16
18 U.S.C. 3664(j)(1) (Supp. IV 1998) 8, 37
18 U.S.C. App. 1202(a) (1976) 44
26 U.S.C. 5861(f) 3

Miscellaneous: Page

Anti-Arson Act of 1982: Hearing on H.R. 6377 and H.R. 6454 Before the Subcomm. on Crime of the House Comm. on the Judiciary, 97th Cong., 2d Sess. (1982) 21-22
116 Cong. Rec. (1970):
p. 35,198 ..... 3, 5, 26
p. 35,359 ..... 6, 30
p. 35,363 4
p. 36,296 4
p. 37,187 26
16 George J. Couch, *Couch on Insurance* (1983) 38
Explosives Control: Hearings on H.R. 17154, H.R. 16699, H.R. 18573 and Related Proposals Before Subcomm. No. 5 of the House Comm. on the Judiciary, 91st Cong., 2d Sess. (1970) 4, 6, 25, 26, 27, 28, 30, 42
H.R. 16699, 91st Cong., 2d Sess. (1970) 3, 5
H.R. 18573, 91st Cong., 2d Sess. (1970) 3
H.R. Rep. No. 678, 97th Cong., 2d Sess. (1982) 6
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Restatement (Third) of Property (Mortgages) (1997) 40
Websters Third New International Dictionary (1976) 18

In the Supreme Court of the United States

No. 99-5739

DEWEY J. JONES, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (J.A. 40-44) is reported at 178 F.3d 479. The opinions of the district court denying petitioner's motion to dismiss the indictment (J.A. 4-7) and his motion for judgment of acquittal (J.A. 23-28) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 17, 1999. The petition for a writ of certiorari was filed on August 13, 1999, and was granted on November 15, 1999. 120 S. Ct. 494. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Commerce Clause of the Constitution, Article I, Section 8, Clause 3, provides:

> The Congress shall have Power * * * [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes.

2. The Necessary and Proper Clause of the Constitution, Article I, Section 8, Clause 18, provides:

> The Congress shall have Power * * * To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

3. Section 844(i) of Title 18, United States Code (Supp. IV 1998), provides:

> Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned for not less than 5 years and not more than 20 years, fined under this title, or both; and if personal injury results to any person, including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this subsection, shall be imprisoned for not less than 7 years and not more than 40 years, fined under this title, or both; and if death results to any person, including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this subsection, shall also be subject to imprisonment for any term of years, or to the death penalty or to life imprisonment.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Indiana, petitioner was convicted on one count of damaging property by means of fire and explosives, in violation of 18 U.S.C. 844(i) (Supp. IV 1998); one count of making an illegal destructive device, in violation of 26 U.S.C. 5861(f); and one count of using a destructive device during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c). J.A. 29. He was sentenced to 420 months' imprisonment, to be followed by five years' supervised release, and was ordered to pay restitution of $77,386.87 to the victims' insurer. J.A. 30-39. Petitioner appealed his conviction under Section 844(i), and the court of appeals affirmed. J.A. 40-44.

1. a. Section 844(i) of Title 18, United States Code (Supp. IV 1998), was first enacted as part of Title XI of the Organized Crime Control Act of 1970. See Pub. L. No. 91-452, § 1102, 84 Stat. 958. It established criminal penalties for any person who "maliciously damages or destroys, or attempts to damage or destroy, by means of an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce." 84 Stat. 958; 18 U.S.C. 844(i) (1970).

Title XI emerged from two bills, H.R. 18573 and H.R. 16699, 91st Cong., 2d Sess. (1970), that were introduced by Representative McCulloch in the House of Representatives and were referred to the House Committee on the Judiciary. See 116 Cong. Rec. 35,198 (1970) (statement of Rep. McCulloch); see *Russell* v. *United*

States, 471 U.S. 858, 860 n.5 (1985). Those bills, together with other legislative proposals concerning the regulation of explosives and explosives-related crimes, were the subject of hearings before a House subcommittee during the summer of 1970. See *Explosives Control: Hearings on H.R. 17154, H.R. 16699, H.R. 18573 and Related Proposals Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 91st Cong., 2d Sess. (1970) (*1970 House Hearings*). The House Judiciary Committee added Title XI to a bill (S. 30) previously passed by the Senate, see H.R. Rep. No. 1549, 91st Cong., 2d Sess. 1 (1970) (1970 House Report), and the bill as amended was enacted into law. See 116 Cong. Rec. 35,363 (1970) (passage in House of Representatives); 116 Cong. Rec. 36,296 (1970) (passage in Senate).

H.R. 16699, as initially introduced in the House of Representatives, applied to the destruction by explosives of property "used for business purposes by a person engaged in commerce or in any activity affecting commerce." *1970 House Hearings* at 31. The phrase "for business purposes" was not included, however, in the bill reported by the House Judiciary Committee. The House Report stated:

> Section 844(i) proscribes the malicious damaging or destroying, by means of an explosive, [of] any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce. Attempts would also be covered. Since the term affecting [interstate or foreign] "commerce" represents "the fullest jurisdictional breadth constitutionally permissible under the Commerce Clause," *NLRB* v. *Reliance Fuel Corp.*, 83 S. Ct. 312, 371 U.S. 224, 226, 9 L. Ed.2d 279 (1963), this is a very broad provision covering substantially all business property. While this provision is broad, the committee believes that there is no question that it is a permissible exercise of Congress['s] authority to regulate and to protect interstate and foreign commerce. Numerous other Federal statutes use similar language and have been constitutionally sustained in the courts.

1970 House Report at 69-70. Representative McCulloch stated that the provisions of Section 844 had been largely drawn from H.R. 16699, but that the House Judiciary Committee had "extended the provision protecting interstate and foreign commerce from the malicious use of explosives to the full extent of [Congress's] constitutional power." 116 Cong. Rec. 35,198 (1970).[1]

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[1] Section 1106(b)(1) of the Organized Crime Control Act of 1970, 84 Stat. 960, repealed former 18 U.S.C. 837(c) (1964), which provided that possession or use of explosives with the intent to damage or destroy "any building or other real or personal property used for educational, religious, charitable, residential, business, or civic objectives" would create a "rebuttable presumption[] that the explosive was transported in interstate or foreign commerce or caused to be transported in interstate or foreign commerce by the person so possessing or using it, or by a person aiding or abetting the person so possessing or using it." 18 U.S.C. 837(c) (1964). Representative Poff explained:

> This presumption was removed from the bill primarily for two reasons: First, that the presumption itself is of limited utility, because it requires evidence independent of the presumption to sustain it. [Second,] * * * there is the substantial doubt as to the constitutionality of such a presumption. The gentleman is familiar with the decision of the Supreme Court in Tot against United States, and more

b. Section 844(i) was amended in 1982 to add the words "fire or" before the words "an explosive." See Pub. L. No. 97-298, § 2(c), 96 Stat. 1319.[2] The House Report accompanying the 1982 legislation explained that "[t]he current requirement that the damage be 'caused by means of an explosive' results in the allocation of a great deal of investigative resources to proving that fact, even though it has been established that the fire was intentionally set, and the criminal parties may be known." H.R. Rep. No. 678, 97th Cong., 2d Sess. 2 (1982). The Report also noted the existence of a circuit conflict on the question whether the use of gasoline or other flammable liquids to ignite a fire was covered by existing law. *Id.* at 2 & nn.5-6. The House Report stated that "[t]he jurisdictional circumstances enumerated in" Section 844 "otherwise remain unchanged." *Id.* at 1.

c. In *Russell*, this Court held that Section 844(i) reached the attempted arson of a two-unit apartment building used as rental property. See 471 U.S. at 858-

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recently in Leary against United States, which referred to the Tot case.

116 Cong. Rec. 35,359 (1970); see also *1970 House Hearings* at 37 (Justice Department witness states that the presumption in former Section 837(c) "is of dubious validity or value"). Representative Poff's case references are to *Leary* v. *United States*, 395 U.S. 6 (1969), and *Tot* v. *United States*, 319 U.S. 463 (1943). Those cases announce the rule that under the Due Process Clause, "a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience." *Leary*, 395 U.S. at 33 (quoting *Tot*, 319 U.S. at 467-468).

[2] The 1982 law made the same change to 18 U.S.C. 844(e), (f), and (h)(1). See Pub. L. No. 97-298, § 2(a) and (b), 96 Stat. 1319.

859. The Court observed that Section 844(i)'s "reference to 'any building . . . used . . . in any activity affecting interstate or foreign commerce' expresses an intent by Congress to exercise its full power under the Commerce Clause." *Id.* at 859. It reasoned that:

> the statute only applies to property that is "used" in an "activity" that affects commerce. The rental of real estate is unquestionably such an activity. * * * [T]he local rental of an apartment unit is merely an element of a much broader commercial market in rental properties. The congressional power to regulate the class of activities that constitute the rental market for real estate includes the power to regulate individual activity within that class.

Id. at 862 (footnote omitted). Applying that analysis, the Court concluded that the defendant "was renting his apartment building to tenants at the time he attempted to destroy it by fire. The property was therefore being used in an activity affecting commerce within the meaning of § 844(i)." *Ibid.*

2. Petitioner threw a Molotov cocktail into the Fort Wayne, Indiana, living room of his cousin and the cousin's wife (the Walkers), causing the home to be severely damaged by fire. J.A. 40. He was charged with violating (*inter alia*) Section 844(i). See J.A. 2 (indictment). The district court denied petitioner's motion to dismiss the indictment, relying on prior Seventh Circuit decisions holding that Section 844(i) applies to the damage by fire or explosives of a private residence supplied with natural gas from an out-of-state source. J.A. 4-7.

The government's evidence at trial established three distinct connections between interstate commerce and the home that was damaged by petitioner's crime.

First, an insurance adjuster testified that American Family Insurance, a company headquartered in Wisconsin, had paid a claim under a homeowner's policy for damage done by the fire. J.A. 8-10.[3] Second, an employee of Midland Mortgage Company, headquartered in Oklahoma, testified that the company held a mortgage on the residence and received monthly payments on the mortgage. J.A. 12-14.[4] Finally, employees of the Northern Indiana Public Service Company (Nipsco) testified that the residence was receiving Nipsco natural gas on the date that the fire occurred, and that Nipsco obtained its natural gas from out-of-state sources, including Texas, Louisiana, and Canada. J.A. 15-16. Petitioner was convicted on all charges, see J.A. 29, and the district court denied his post-trial motion for judgment of acquittal, see J.A. 23-28.

3. Petitioner appealed, seeking reversal of his conviction under Section 844(i) on the ground that the statute "exceeds Congress's power under the Com-

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[3] The Presentence Investigation (PSI) Report estimated the loss to the insurer at $77,386.87. PSI Report ¶ 14. Petitioner was ordered to pay restitution to the insurer in that amount. J.A. 36; see 18 U.S.C. 3664(j)(1) (Supp. IV 1998) ("If a victim has received compensation from insurance or any other source with respect to a loss, the [sentencing] court shall order that restitution be paid to the person who provided or is obligated to provide the compensation.").

[4] The mortgage company employee also testified that the Walkers' insurance premiums had been paid to the mortgage company along with the mortgage payments; the mortgage company had then forwarded the premiums to the insurance company. J.A. 13-14. The employee further testified that he had persuaded the insurance company to pay the Walkers' claim for the fire damage when the insurer expressed an initial unwillingness to do so. *Ibid.*

merce Clause * * * when applied to the destruction of a residence rather than a commercial establishment." J.A. 40. The court of appeals affirmed. J.A. 40-44. It observed that "the owner of the residence purchased natural gas in interstate commerce, secured a mortgage from an out-of-state lender, and received an insurance check from an out-of-state insurer." J.A. 41. The court stated that "these interstate connections are pretty slight for a single building," but it concluded that "proof of a small effect will satisfy the statute." *Ibid.*

The court of appeals explained that under this Court's decision in *United States* v. *Lopez*, 514 U.S. 549 (1995),

> any activity that substantially affects commerce may be regulated. Although living in one's own house is not commerce, the residential housing industry is interstate in character. Goods and materials for housing move across state borders; gas and electricity likewise; the financial and insurance markets that provide loans and spread risks have national if not international scope; arson can substantially affect all of these.

J.A. 42. The court relied in part on this Court's decisions in *McLain* v. *Real Estate Board of New Orleans, Inc.*, 444 U.S. 232 (1980), and *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975), to support its conclusion that "residential property in the aggregate substantially affects interstate commerce." J.A. 43.

Finally, the court of appeals observed that "[i]f instead of asking whether 'residential real estate' substantially affects commerce we ask whether 'arson of buildings' or even 'arson of residences' substantially affects commerce, the answer still must be yes." J.A. 43. The court cited a Federal Bureau of Investigation

report stating that 19,888 residential buildings were subjected to arson in 1997, and that the average "damage was a little more than $14,000 per residential arson," for a "total of approximately $280 million lost to residential arsons in 1997 alone." *Ibid.* The court noted that "[i]f even a small fraction of the loss is covered by interstate insurance markets, the effect is 'substantial.'" *Ibid.* The court of appeals concluded that "[t]his collective effect, plus proof of a slight connection between the particular arson and interstate commerce, permits the national government to establish substantive rules of conduct." J.A. 44.

SUMMARY OF ARGUMENT

I. The federal arson statute, 18 U.S.C. 844(i), applies to the arson of the residential property in this case.

A. The phrase "affecting interstate or foreign commerce" is a term of art with an established legal significance. By employing that phrase in Section 844(i), Congress unambiguously expressed its intent to exercise the full scope of its Commerce Clause authority to protect property used in activities affecting interstate commerce from criminal damage or destruction by fire or explosives. Petitioner's contention that the statute should be construed in a manner that avoids close constitutional questions is directly at odds with that congressional intent.

B. Application of Section 844(i) to petitioner's conduct is consistent both with the text of the statute and with the purpose of the jurisdictional element. The underwriting and servicing of mortgage loans, the issuance and administration of casualty insurance policies, and the supply and consumption of natural gas are all "activit[ies] affecting interstate or foreign commerce." The Walkers' residence was "used" in

those activities under a common-sense understanding of that term. That is particularly evident in light of this Court's decision in *Russell* v. *United States*, 471 U.S. 858 (1985), which establishes that residential property is covered by Section 844(i) if it is employed as an investment resource, whether or not its occupants are engaged in any commercial pursuit. The interstate connections proved in this case substantially further the purpose of Section 844(i)'s jurisdictional element. They establish that the Walkers' property was used in such a manner that its destruction or damage by fire could reasonably be expected to have a direct impact on interstate commerce.

C. Contrary to petitioner's contention, the legislative history does not suggest that Congress intended to exclude owner-occupied residential property from the coverage of Section 844(i). To the contrary, the relevant legislative materials make clear that Congress intended to exercise the full extent of its Commerce Clause authority. Some members of Congress believed that the protection of private residences from arson lay beyond congressional control. Such members would logically have concluded that the statute would not cover such arsons, because the coverage of Section 844(i) reached no farther than the sweep of Congress's power under the Commerce Clause. But nothing in the legislative record suggests that Congress intended to exclude any building used in an activity that brings it within federal protection as a constitutional matter.

II. The application of Section 844(i) here is constitutional.

A. Congress's authority "[t]o regulate Commerce * * * among the several States" includes the power to regulate intrastate noncommercial activity that substantially affects interstate commerce. This Court's

decision in *Russell* makes clear that Section 844(i) is constitutional as applied to a building used to generate revenue for an owner who rents it as a residence. Congress has the power to punish violent acts that are committed for non-economic reasons but that can be expected to have a sufficiently direct deleterious effect on interstate commerce.

B. As applied in the present case, Section 844(i)'s jurisdictional element ensures that the statute is limited to property, and offenses, having a constitutionally sufficient nexus to interstate commerce. Contrary to petitioner's contention, the connections between petitioner's crime and interstate commerce are neither attenuated nor speculative. Most significantly, the damage caused by petitioner's unlawful conduct triggered a legal duty for a Wisconsin insurer to pay over $75,000 to persons in another state. The crime also directly threatened the mortgagee's ability to use the property as security for the outstanding debt, and it created a substantial risk that interstate natural gas deliveries would be interrupted.

C. As this Court recognized in *United States* v. *Lopez*, 514 U.S. 549 (1995), to permit Congress to regulate all activity that might have some indirect or remote downstream effect on interstate commerce would improperly vest plenary power in the national government. The precise limits on the Commerce Clause power, however, turn on matters of degree, not on bright-line formulas. There is nothing impermissible in federal regulation of violent conduct that exposes identified out-of-state business enterprises to economic harm. Nor does it exceed Congress's power to punish conduct that is foreseeably likely to interrupt or diminish sales of out-of-state natural gas to a home,

since the aggregate interstate commercial effects of all such reductions would be substantial.

Where a Commerce Clause statute includes an "affecting commerce" jurisdictional element, there are a variety of forms of connections to interstate commerce that may satisfy the Constitution. That some genuine nexus must exist, however, does not mean that the government must prove an *actual effect* on commerce in every Section 844(i) prosecution. Still less is there a constitutional requirement that the government must prove a "substantial effect" in each case. Indeed, this Court in *Russell* affirmed the defendant's conviction for an unsuccessful attempt to set fire to a single rental building. The applications at issue in *Russell* and this case are valid because they protect interstate markets and businesses against the harms that flow directly and significantly from criminal destruction of property. The coverage of the statute is broad, but that is consistent with Congress's authority to safeguard the interstate economy and the firms that do business in it from the predictable financial harms that are the consequence of crimes against property.

ARGUMENT

I. SECTION 844(i) CANNOT REASONABLY BE CONSTRUED TO CONTAIN A CATEGORICAL EXCLUSION OF OWNER-OCCUPIED PRIVATE RESIDENCES

A. Congress Unambiguously Expressed Its Intent To Extend Section 844(i) To The Full Scope Of Its Authority Under The Commerce Clause

This Court has repeatedly recognized that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will

construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). Relying on that canon of construction, petitioner argues (Br. 15-17) that unless the text and history of Section 844(i) reveal an unambiguous congressional intent to cover the private residence that was victimized by his crime, his conviction must be reversed. That argument misconceives the analysis that applies where (as here) Congress has unambiguously signaled its intent to exercise the full scope of its constitutional authority.

As the Court explained in *United States* v. *Darby*, 312 U.S. 100 (1941),

> this Court ha[s] many times held that the power of Congress to regulate interstate commerce extends to the regulation through legislative action of activities intrastate which have a substantial effect on the commerce or the exercise of the Congressional power over it.
>
> In such legislation Congress has sometimes left it to the courts to determine whether the intrastate activities have the prohibited effect on the commerce, as in the Sherman Act. It has sometimes left it to an administrative board or agency to determine whether the activities sought to be regulated * * * have such effect * * *, or whether they come within the statutory definition of the prohibited Act * * *. And sometimes Congress itself has said that a particular activity affects the commerce.

Id. at 119-120 (footnote omitted). Thus, Congress might have chosen to define, in the text of Section 844(i), the

specific categories of real and personal property that it found bore a sufficient connection to interstate commerce to warrant federal protection. But Congress chose instead to entrust the courts with the determination of whether particular kinds of property bear the requisite commercial nexus.

The "affecting commerce" standard that Congress selected had a well-established legal significance. As a matter of statutory construction, this Court has consistently distinguished between laws confined to activities "in" commerce and the more expansive laws that extend to activities "affecting" commerce. See *Russell* v. *United States*, 471 U.S. 858, 859 n.4 (1985); *Scarborough* v. *United States*, 431 U.S. 563, 571 (1977); *United States* v. *American Bldg. Maintenance Indus.*, 422 U.S. 271, 280 (1975). When Congress legislates solely with respect to activities "in" commerce, the statute will ordinarily be construed to reach only those activities that are actually within the flow of commerce or directly connected with it. See, *e.g.*, *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186, 194-195 (1974). Use of the phrase "affecting interstate commerce," by contrast, reflects congressional intent to exercise "the fullest *jurisdictional* breadth constitutionally permissible under the Commerce Clause." *NLRB* v. *Reliance Fuel Oil Corp.*, 371 U.S. 224, 226 (1963) (per curiam); accord, *e.g.*, *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 273 (1995); *Russell*, 471 U.S. at 859 & n.4; *Scarborough*, 431 U.S. at 571-572; *American Bldg. Maintenance*, 422 U.S. at 280; *Polish National Alliance* v. *NLRB*, 322 U.S. 643, 647 (1944) ("[W]hen [Congress] wants to bring aspects of commerce within the full sweep of its constitutional authority, it manifests its purpose by regulating not only 'commerce' but

also matters which 'affect,' 'interrupt,' or 'promote' interstate commerce.").

Congress was well aware that its employment of the "affecting commerce" standard in Section 844(i) reflected an intent, in light of this Court's cases, to invoke the full jurisdictional authority that Congress possesses under the Commerce Clause.[5] See 1970 House Report at 69-70. The Court in *Russell* recognized that "[t]he reference [in Section 844(i)] to 'any building . . . used . . . in any activity affecting interstate or foreign commerce' expresses an intent by Congress to exercise its full power under the Commerce Clause." 471 U.S. at 859. In light of Congress's clearly stated intent, petitioner's request for a narrowing construction of the statute must be rejected. The canon that ambiguous statutes will be construed so as to avoid grave constitutional questions "is followed out of respect for Congress, which [the Court] assume[s] legislates in the light of constitutional limitations. It is qualified by the proposition that avoidance of a difficulty will not be pressed to the point of disingenuous evasion." *Rust* v. *Sullivan*, 500 U.S. 173, 191 (1991) (citation and internal quotation marks omitted).

By employing the phrase "affecting interstate or foreign commerce," Congress in Section 844(i) expressed its unambiguous intent to exercise the full

[5] Precisely speaking, Section 844(i) was intended to exercise all of Congress's commerce power based on the *uses* of the property involved in the offense. Congress could also have used its commerce power to criminalize conduct based on the defendant's movement in commerce, cf. 18 U.S.C. 1952, the incendiary material's or the explosive's movement in commerce, cf. 18 U.S.C. 922(a), or the effects on commerce of the arson itself, cf. 18 U.S.C. 2332a(a)(2) (Supp. IV 1998).

scope of its authority under the Commerce Clause to protect property used in activities affecting interstate commerce against criminal destruction by fire or explosives. The necessary consequence of that mode of statutory draftsmanship is that in close cases the applicability of Section 844(i) will turn on judicial resolution of difficult constitutional questions. Petitioner's proposed narrowing construction—which would in essence limit Section 844(i)'s coverage to those buildings and other property that are *indisputably* suitable for federal protection under the Commerce Clause—ignores the settled legal significance of the phrase "affecting commerce." Given Congress's use of that established term of art, a judicial preference for avoiding close constitutional questions would not show respect for Congress's intention; it would instead disregard Congress's purpose to legislate to the limit of its constitutional authority.

Adopting a narrowing construction in this case is unnecessary to avoid the danger that an Act of Congress will be held unconstitutional. Cf. *DeBartolo*, 485 U.S. at 575 (rule that ambiguous statutes will be construed to avoid constitutional difficulties is based in part on the principle that "courts will * * * not lighty assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it"). If this Court reaches the constitutional question in this case, and concludes that the residence damaged by petitioner lacked a sufficient nexus to commerce to justify federal protection, it will hold that Section 844(i) does not apply to petitioner's conduct—not that the statute is invalid. Indeed, the whole point of an "affecting commerce" element is to allow Congress to exercise its full constitutional authority without the danger of overreaching, by

ensuring that the statute sweeps neither more nor less broadly than the Commerce Clause permits.

B. Application Of Section 844(i) To Petitioner's Conduct Is Consistent Both With The Text Of The Statute And With The Purpose Of The Jurisdictional Element

Section 844(i) prohibits the malicious damage or destruction, by means of fire or explosives, of "*any* building, vehicle, or other real or personal property used in interstate or foreign commerce or in *any* activity affecting interstate or foreign commerce." 18 U.S.C. 844(i) (Supp. IV 1998) (emphasis added). "Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *United States* v. *Gonzalez*, 520 U.S. 1, 5 (1997) (quoting *Webster's Third New International Dictionary* 97 (1976)). Use of the word "any" strongly suggests that Congress did not intend a categorical exclusion of any class of buildings or other property; rather, a building or property of whatever sort is covered if it is shown to bear the requisite connection to interstate commerce. Petitioner does not appear to dispute that the residence damaged by his unlawful conduct was a "building" within the meaning of the statute. See, *e.g.*, *Webster's Third New International Dictionary* 292 (1976) ("[B]uilding: * * * a constructed edifice * * * serving as a dwelling * * * or other useful structure."). His argument (Br. 14) that "Section 844(i) does not apply to arson of a private residence" would have the practical effect, however, of creating the sort

of categorical exclusion that Congress declined to write into the law.[6]

The residence involved in this case was mortgaged to an Oklahoma lender, was insured by a Wisconsin insurer, and received natural gas from sources outside the State of Indiana. See J.A. 25, 41. The underwriting and servicing of mortgage loans, the issuance and administration of casualty insurance policies, and the supply of natural gas are all "activit[ies] affecting interstate or foreign commerce." 18 U.S.C. 844(i) (Supp. IV 1998). See, *e.g.*, *McLain* v. *Real Estate Board of New Orleans, Inc.*, 444 U.S. 232, 245 (1980) (financing of residential property); *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533, 538-539 (1944) (fire insurance); *Illinois Natural Gas Co.* v. *Central Ill. Pub. Serv. Co.*, 314 U.S. 498, 503-504 (1942) (distribution of natural gas). As we explain below, the Walkers' home was "used" in those activities under a common-sense understanding of that term.

A central theme of petitioner's brief is that the links to commerce identified in this case are arbitrary or unreal—that they have no functional bearing on the

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[6] Congress's intent not to exclude residential property per se is also supported by 18 U.S.C. 844(e) (Supp. IV 1998). Section 844(e) establishes criminal penalties for any person who "through the use of the mail, telephone, telegraph, or other instrument of interstate or foreign commerce, willfully makes any threat * * * unlawfully to damage or destroy any building, vehicle, or other real or personal property by means of fire or an explosive." 18 U.S.C. 844(e) (Supp. IV 1998). Because Section 844(e) does not require proof of any connection between the building (or other property) and interstate commerce, it applies unambiguously to a threat to destroy a private residence, if that threat is made by the specified jurisdictional means. The natural inference is that Congress also intended Section 844(i) to cover similar property if the jurisdictional nexus in that provision is satisfied.

question whether the physical integrity of the Walkers' residence was an appropriate subject of federal concern. That argument is incorrect. The interstate connections proved in this case substantially further the purpose of Section 844(i)'s jurisdictional element. They establish that the Walkers' property was used in such a manner that its destruction or damage by fire could reasonably be expected to have a direct and concrete impact on interstate commerce.

1. The real property at issue in this case was "used" by the Walkers as collateral to obtain and secure their mortgage loan. It was also "used" by the mortgage company as security for the outstanding indebtedness. The mortgagee—an Oklahoma company engaged in interstate commerce—retained a property interest in the mortgaged real estate and a direct financial stake in the physical integrity of the Walkers' residence. Destruction of the home by fire presumably would not affect the Walkers' legal obligation to repay the loan, but it might well impair their practical ability to do so, and it would sharply diminish the value of the company's security in the event of borrower default.

This Court's decision in *Russell* makes clear that residential property is "used" in an "activity affecting interstate or foreign commerce" if it is employed as an investment resource, whether or not its *occupants* are engaged in any commercial pursuit. Thus, the *Russell* Court concluded that the defendant in that case "was renting his apartment building to tenants at the time he attempted to destroy it by fire. The property was therefore being used in an activity affecting commerce within the meaning of § 844(i)." 471 U.S. at 862. Although the bulk of petitioner's statutory argument is devoted to the proposition (Br. 14) that "Section 844(i) does not apply to arson of a private residence," petitioner appears to accept this Court's holding in *Russell*, and at one point he acknowledges (Br. 19) that a person can "use" residential property by "rent[ing it] out for profit." Petitioner thus concedes that residential property is "used" in an "activity affecting interstate or foreign commerce" if its occupant pays rent to a landlord. But he asserts that the property is not so used if the occupant has pledged the residence as security for an outstanding debt and makes monthly mortgage payments to a commercial enterprise as a condition of avoiding foreclosure. Petitioner offers no basis, however, for believing that the 1970 Congress (or any reasonable legislature) would have wished to cover one use of real property but not the other, analogous use.

An employee of the Midland Mortgage Company testified that the company suffered no financial loss as a result of the fire in this case. See J.A. 14. That was so, however, because the company had protected its interests by forwarding the Walkers' insurance premiums to the Wisconsin insurer, and by interceding when the insurer appeared unwilling to pay the claim. See J.A. 12-14. Indeed, the mortgage company's active role in the administration of the Walkers' insurance policy attests to the mortgagee's recognition of its own economic stake in the physical integrity of the residence.

2. The Walkers' residence was also "used" in the underwriting and administration of casualty insurance, since the home was the very subject of the insurance agreement.[7] The insurance policy served not only to

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[7] During congressional hearings on the 1982 amendments to Section 844 (which extended the statute's coverage to damage or destruction caused by "fire," see p. 6, *supra*), an insurance industry

safeguard the Walkers' interests, but also to protect the mortgagee's security for the outstanding indebtedness. The policy was thus an integral feature of the use of the property as collateral for the mortgage loan. The fact that a home is insured by an out-of-state company gives rise to a reasonable expectation that its damage or destruction by fire may have a tangible impact on interstate commerce. That possibility materialized in the instant case: petitioner's criminal conduct, and the consequent damage to the Walkers' home, triggered a legal obligation for the insurer to make a payment of more than $75,000 across state lines.

3. The Walkers' home was also "used" in the "activity" of supplying natural gas. The conversion of gas into heat depends on the existence and proper operation of appropriate piping and other physical equipment—including the controls that regulate the volume of gas utilized—within the house itself. Any other segment of a gas company's pipelines would surely constitute property "used" in the provision of natural gas, and there is no basis for a different characterization of the equipment located within the residence. The residence was also "used" in activities that consume natural gas; the volume of gas provided to the residence depended on the activities of the occupants within it. Proof that a house receives interstate natural gas is directly related to the purpose of Section 844(i)'s jurisdictional element, since such proof

representative testified about the costs to the industry resulting from arson fires and provided the subcommittee with an industry report on the subject. See *Anti-Arson Act of 1982: Hearing on H.R. 6377 and H.R. 6454 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 97th Cong., 2d Sess. 39-79 (1982). Congress was thus well aware that financial loss to insurers was among the harms caused by conduct violative of Section 844(i).

evidences a substantial likelihood that the completed crime would interfere with interstate commerce. Destruction of the house, or damage sufficient to cause the residents to vacate the premises, would lead inevitably to a reduction in the quantity of gas shipped in interstate commerce. See J.A. 41-42; *United States* v. *Hicks*, 106 F.3d 187, 189 (7th Cir. 1997).[8]

4. Finally, the term "used" should be construed in a manner that effectuates Congress's overriding intent—expressed both through Section 844(i)'s use of a term of art ("affecting commerce") having a settled legal significance, and through the Section's expansive coverage of "any" building or property having the requisite commercial nexus—to exercise the full scope of its Commerce Clause authority. That a residence is in one sense quintessentially private (in that it is typically the site of an individual's most intimate activities) should not obscure the fact that a house *qua* physical structure is a substantial *economic* asset. Its damage by fire or explosives will often have significant financial consequences for a variety of interstate commercial actors. Congress has a valid basis in the Commerce Clause to

[8] As petitioner observes (Br. 6), the government did not present direct evidence concerning the effect of the fire on the Walkers' consumption of natural gas. The insurance claim paid to the Walkers, however, included slightly over $10,000 for "living expenses for the family while the home was being repaired." PSI Report ¶ 14. It is a fair inference from the record that the Walkers were forced to vacate the premises for a significant period of time, and that the volume of natural gas dispensed to the residence accordingly decreased. In any event, Section 844(i)'s jurisdictional element does not require case-specific proof of an actual effect on commerce. The defendant in *Russell*, for example, was convicted of an *unsuccessful attempt* to set fire to residential property. 471 U.S. at 859 & n.1.

protect those interests, whether the residential property is rented or occupied by its owner.[9]

[9] In *United States* v. *Mennuti*, 639 F.2d 107 (2d Cir. 1981), the court of appeals held that damage or destruction of a private dwelling is not reached by Section 844(i), because the statute was limited to "business property *used* in interstate or foreign commerce or in an activity affecting such commerce." *Id.* at 111. Judge Friendly's opinion for the court in that case, however, has been superseded by this Court's decision in *Russell*. See *United States* v. *Ramey*, 24 F.3d 602, 607 (4th Cir. 1994) (discussing inconsistency between *Russell* and *Mennuti*), cert. denied, 514 U.S. 1103 (1995); *United States* v. *Shively*, 927 F.2d 804, 808 (5th Cir.) (same), cert. denied, 501 U.S. 1209 (1991); *United States* v. *Stillwell*, 900 F.2d 1104, 1109-1110 (7th Cir.) (same), cert. denied, 498 U.S. 838 (1990). *Mennuti* assumed that the activities of daily living by the occupants of the property were the *only* relevant activities that could be considered. 639 F.2d at 110 (finding it insufficient that "a dwelling was advertised for rental, and that a lessee might come from without the state"). That assumption was later contradicted by this Court's decision in *Russell*, in which the Court held that arson of residential property *is* covered when it is used as rental property. *Russell* thus makes clear that uses of the building by persons other than the occupants (the owners, in *Russell* itself) are relevant. In light of *Russell*, uses of the property by other businesses (such as mortgage lenders) are also relevant. The *Mennuti* court may also have been led astray by the statement in the House Committee report that Section 844(i) covers "substantially all business property." See *Mennuti*, 639 F.2d at 111 (discussing 1970 House Report at 69-70). The court overlooked that Congress deliberately deleted language from an earlier bill that would have expressly limited Section 844(i) to property used for "business purposes." See pp. 25-27, *infra*.

C. The Legislative History Of Section 844(i) Does Not Support Any Categorical Exclusion Of Owner-Occupied Residential Property

Petitioner also contends (Br. 27-28) that the legislative history of the Organized Crime Control Act of 1970 reflects a congressional intent to exclude residential property from the coverage of Section 844(i). That argument is incorrect. Far from supporting petitioner's reading of the statute, the relevant legislative materials make clear that Congress intended to exercise the full extent of its Commerce Clause authority. Certain members of Congress may have doubted that Congress's constitutional powers extended to prohibiting the bombing of private residences, and may therefore have believed that as a practical matter the statute would not cover such crimes. But nothing in the legislative history suggests that Congress intended to exclude any building or other property with a sufficient nexus to commerce to satisfy constitutional requirements.

1. H.R. 16699 was originally drafted to cover property used in activities "affecting interstate or foreign commerce" only if the property was used "for business purposes." A Justice Department witness defended that restriction on the ground that "[w]e wanted to make sure that it was property used for business purposes, not the home of a businessman who is head of a corporation which has engaged in interstate business. We don't want to protect his home. We want to just protect the business." *1970 House Hearings* at 74. Representative Wilson then stated that "[t]he reason, of course, for not protecting the home is the basic Federal jurisdiction of interstate commerce." *Ibid.* The subcommittee heard other testimony,

however, that a limitation of coverage to business property was too restrictive because terrorists had recently bombed schools, police stations, and churches (buildings that might not be considered "business property"). Other members thus expressed the view that private residences and other noncommercial property ought to be covered. See *id.* at 289 (Rep. Goldwater states: "I believe this bill should include any building, vehicle or any real property * * * not just businesses."); *id.* at 300-301 (Rep. Wylie argues that the bill should cover all buildings, including a "private dwelling or a church or other property not used for business," and that such legislation would be permissible under the Commerce Clause); *id.* at 304-305 (Rep. Cramer states that the bill "should be broadened to include any destruction of property" without exception because "a person has a right to safety and security of his home and to the security of his property").

The bill subsequently reported by the House Judiciary Committee (and ultimately enacted by Congress) did not contain the limiting phrase "for business purposes." The bill's sponsor stated, with apparent reference to that change, that "the committee extended the provision protecting interstate and foreign commerce from the malicious use of explosives to the full extent of our constitutional power." 116 Cong. Rec. 35,198 (1970) (statement of Rep. McCulloch); see also *id.* at 37,187 (Rep. MacGregor states: "Nearly all types of property will now be protected."). Petitioner's proposed exclusion of owner-occupied residential property would resurrect the "business purposes" limitation, contrary to the well-established principle that "[w]here Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not

intended." *Russello* v. *United States*, 464 U.S. 16, 23-24 (1983).

Examination of the relevant 1970 legislative debates reveals uncertainty within Congress over the precise scope of its constitutional power to proscribe explosives-related crimes at non-business locations. The legislation ultimately enacted did not purport to resolve that uncertainty. Congress declined to limit Section 844(i)'s reach to property "used for business purposes." Congress also declined to make a statutory "finding" that particular categories of explosives-related crimes (including crimes against residential property) would have the requisite nexus to interstate commerce.[10] Instead, Congress "left it to the courts to determine" whether particular property has the requisite nexus to commerce, see *Darby*, 312 U.S. at 120, while making clear that it intended to exercise the full extent of its authority under the Commerce Clause. See pp. 4-5, *supra*. An individual member who believed that the bombing of private residences lay beyond congressional control would logically have concluded that Section 844(i) did not cover such residences. But no member suggested that the text of Section 844(i) imposed limitations on the scope of covered property beyond those imposed by the Constitution itself.[11]

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[10] When Representative Wylie stated that "Congress can in and of itself make a finding that a specific act involves interstate commerce if it so desires," Representative Celler responded, "We can make a declaration but will the Supreme Court sustain us?" *1970 House Hearings* at 301.

[11] Petitioner's reliance (Br. 28) on the 1970 repeal of former 18 U.S.C. 837(c) (1964) is wholly without basis. Former Section 837(c) applied broadly to "any building or other real or personal property used for educational, religious, charitable, residential, business, or civic objectives." Petitioner's statement (Br. 28) that "[c]onsti-

2. The House Report accompanying the Organized Crime Control Act contained the following description of Section 844(i): "Since the term affecting [interstate or foreign] 'commerce' represents 'the fullest jurisdictional breadth constitutionally permissible under the Commerce Clause,' *NLRB* v. *Reliance Fuel Corp.*, 83 S. Ct. 312, 371 U.S. 224, 226, 9 L.Ed.2d 279 (1963), this is *a very broad provision covering substantially all business property.*" 1970 House Report at 70 (emphasis added). Relying on the italicized language, petitioner argues (Br. 27) that Section 844(i) covers only a subset of "business property" and does not cover residential property at all. Petitioner's reliance on the House Report is misplaced.

To begin with, the opening clause of the same sentence evidences the Committee's awareness of the meaning repeatedly ascribed by this Court to the phrase "affecting commerce." That clause confirms the most natural reading of the statutory language—*i.e.*, that Congress intended to prohibit damage by explosives to real and personal property used in activities affecting interstate commerce to the maximum extent authorized by the Constitution. The language on which petitioner relies, by contrast, has no counterpart in the text of the statute. Indeed, that language tracks almost precisely the Justice Department's description of H.R. 16699 at a time when that bill contained the "business purposes" limitation. See *1970 House Hearings* at 37 (Justice Department witness testifies that the relevant

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tutional concerns motivated the repeal" is literally accurate. Those constitutional concerns, however, involved Due Process Clause constraints on Congress's authority to establish evidentiary presumptions; they had nothing to do with perceived limitations on congressional power under the Commerce Clause to protect residential property. See note 1, *supra*.

provision of H.R. 16699 "would cover damage by explosives to substantially any business property"). The House Report's reference to "business property" may well have been inadvertent; in any event, it cannot be regarded as an explication of the language that Congress actually enacted into law.

In any event, the House Report's statement that Section 844(i) covers "substantially all business property" need not be construed (as petitioner would construe it) to imply that *only* business property is covered. The statement may be understood as providing an important example of the property that Section 844(i) covers. That is particularly so in light of the fact that Congress specifically considered and disapproved the proposed "business purposes" limitation.

3. On the date that the House of Representatives passed the Organized Crime Control Act, the following exchange occurred on the House floor:

> Mr. HUNGATE. Mr. Chairman, is there anywhere in [the bill] which would provide for an investigation where there was a bombing of a residence—not in interstate commerce?
>
> Mr. CELLER. There is none today and you must remember that *the mere bombing of a private home* even under this bill *would not be covered because of the question of whether the Congress would have the authority under the Constitution.* We limit it to federally owned property and federally controlled property that has been the recipient of a grant of Federal funds or that is financially connected with the Federal Government, like airports, universities, and various installations of the Government.

116 Cong. Rec. 35,359 (1970) (emphasis added). Petitioner's reliance (Br. 28) on the italicized language is misplaced.

Most obviously, Representative Celler was wrong in describing the bill reported by the House Judiciary Committee, and subsequently passed by Congress, as limited to property owned, controlled, or funded by the federal government. While Section 844(f) reaches federal property, Section 844(i) reaches property in or affecting interstate commerce. Representative Celler may have been thinking of his own proposed legislation to prohibit bombings—which did not contain any provision comparable to Section 844(i)—when he stated that the bill reached only federal property and did not apply to residences. See *1970 Hearings* at 3, 21-23.

Even if Representative Celler is assumed to have taken account of Section 844(i), his statement is properly regarded as an assertion that bombing of private residences is beyond the scope of Congress's constitutional authority. A congressman who understood that the phrase "affecting commerce" invoked the full reach of Congress's power, and who believed that Congress lacked power to prohibit the bombing of private homes, could quite logically state that Section 844(i) would not cover such bombings. That statement would not mean that Congress had so limited the range of property subject to federal protection, but that the Constitution was thought to do so.[12]

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[12] During the subcommittee hearings, Representative Cramer proposed that the bill be expanded to cover all real and personal property. *1970 House Hearings* at 304-305. Representative Celler responded: "I am as anxious as you to proscribe all bombings. I am a little concerned whether or not the Congress has that power." *Id.* at 305. Congress's use of the phrase "affecting interstate or foreign commerce" is precisely tailored to meet the concerns of a

Thus, even if it were otherwise authoritative, Representative Celler's statement would provide no basis for this Court to construe Section 844(i) to avoid the constitutional question raised in this case. The relevant question is whether arson of private residences may be subject to federal control—not whether some members of the Congress that enacted Section 844(i) believed that it possessed such power. Cf. *Allied-Bruce Terminix Cos.*, 513 U.S. at 275 ("The pre-New Deal Congress that passed the [Federal Arbitration] Act in 1925 might well have thought the Commerce Clause did not stretch as far as has turned out to be the case. But, it is not unusual for this Court in similar circumstances to ask whether the scope of a statute should expand along with the expansion of the Commerce Clause power itself, and to answer the question affirmatively.").

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member who doubts Congress's power to proscribe the bombing of private residences (and therefore could not conscientiously support a bill that expressly imposed such a prohibition), but who regards such a prohibition as desirable. The Seventh Circuit has observed that

> in reaching his conclusion, Representative Celler did not rely on congressional intent to exclude private homes. Rather, he relied on the fact that Congress may not have the power under the commerce clause to reach private homes. The inference is that if a private residence did have a sufficient connection with interstate commerce to satisfy the commerce clause, the statute would cover that residence.

United States v. *Stillwell*, 900 F.2d at 1109.

II. SECTION 844(i) IS CONSTITUTIONAL AS APPLIED TO THE FACTS OF THIS CASE

A. Congress May Prohibit Intrastate Violent Conduct Committed For Non-Economic Motives, So Long As The Conduct Has A Sufficiently Direct And Significant Connection To Interstate Commerce

1. It is well established that "[t]he power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce." *Darby*, 312 U.S. at 118. See also, *e.g.*, *Fry* v. *United States*, 421 U.S. 542, 547 (1975) ("Even activity that is purely intrastate in character may be regulated by Congress, where the activity, combined with like conduct by others similarly situated, affects commerce among the States or with foreign nations."); *Perez* v. *United States*, 402 U.S. 146, 150 (1971).[13]

[13] The power to regulate intrastate activity that has a substantial effect on interstate commerce is confirmed by Congress's constitutional authority "[t]o make all Laws which shall be necessary and proper for carrying into Execution" its enumerated powers. U.S. Const. Art. I, § 8, Cl. 18; see *New York* v. *United States*, 505 U.S. 144, 158-159 (1992) ("The Court's broad construction of Congress' power under the Commerce * * * Clause[] has of course been guided * * * by the Constitution's Necessary and Proper Clause.").

The regulated activity need not itself be commercial. "[E]ven if [the] activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce." *Wickard* v. *Filburn*, 317 U.S. 111, 125 (1942); see also, *e.g.*, *United States* v. *Wrightwood Dairy Co.*, 315 U.S. 110, 121 (1942) ("It is the effect upon interstate commerce or upon the exercise of the power to regulate it, not the source of the injury which is the criterion of Congressional power."). "The fundamental principle is that the power to regulate commerce is the power to enact all appropriate legislation for its protection and advancement; to adopt measures to promote its growth and insure its safety; to foster, protect, control and restrain." *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 36-37 (1937) (citations and internal quotation marks omitted).

2. This Court's decision in *Russell* establishes that Section 844(i) is constitutional as applied to a residential building used in profit-making activities. The Court in *Russell* recognized that Congress's coverage of buildings under Section 844(i) "exercise[d] its full power under the Commerce Clause." 471 U.S. at 859. The Court also observed that "[t]he congressional power to regulate the class of activities that constitute the rental market for real estate includes the power to regulate individual activity within that class." *Id.* at 862. That statement was supported by citation to this Court's constitutional decision in *Perez*. See *id.* at 862 n.11. The *Russell* Court's reference to the scope of "congressional power" in this area, and its citation to *Perez*, make clear that the Court's analysis was not limited to statutory construction, but also expressed a

judgment about the nature of the constitutionally permissible applications of the statute.

The constitutional judgment in *Russell* is that Congress may prohibit violent acts directed at even local properties, when the involvement of those properties in commercial markets means that damage to those properties poses a realistic threat to interstate commerce. In *Russell*, the fact that a local property was rented put that property into "[the] much broader commercial market in rental properties." 471 U.S. at 862. While a single act of malicious damage, or even destruction, of one rental property would not necessarily have substantial or identifiable interstate effects, the rental economy as a whole is made up of such individual units, and if Congress cannot protect the parts, it would be powerless to protect the whole. *Russell* makes clear that Congress is not so limited in its power.

This Court's decision in *Lopez* does not cast doubt on that principle recognized in *Russell*. In *Lopez*, this Court recognized (as the second of three categories of permissible Commerce Clause regulation) that "Congress is empowered to regulate *and protect* the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities." 514 U.S. at 558 (emphasis added). That language, and the accompanying reference to a federal statute that prohibits "the destruction of an aircraft," *ibid.* (quoting *Perez*, 402 U.S. at 150), make clear that Congress has authority to prohibit violent non-economic conduct that directly threatens property having connections to interstate commerce.

The same principle logically applies to regulation under the third category recognized in *Lopez*, *i.e.*,

"regulation[] of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affect[] interstate commerce." 514 U.S. at 561; see also *id.* at 558-559. In order to protect interstate commerce effectively, Congress must have power to restrain intrastate violence that, although undertaken for non-economic motives, is connected in a significant way with commercial transactions.[14] And that is true even if the particular property victimized by crime is not at the time of the criminal act

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[14] That point is implicit in *National Organization for Women, Inc.* v. *Scheidler*, 510 U.S. 249 (1994). While not a constitutional decision, the reasoning in *Scheidler* reflected the Court's recognition that entities that engage in criminal conduct directed at commercial ventures may themselves constitute entities that "affect" commerce. *Id.* at 257-258 (holding that an "enterprise" whose activities affect commerce under the RICO statue, 18 U.S.C. 1961 *et seq.*, need not itself have an economic or profit-making motive, but rather may "affect interstate or foreign commerce" by having "a detrimental influence" on commercial entities engaged in such commerce—in that case, through the alleged extortionate acts of protesters directed at an abortion clinic's personnel and patients).

Since this Court's decision in *Lopez*, several courts of appeals have considered constitutional challenges to the Freedom of Access to Clinic Entrances Act of 1994, 18 U.S.C. 248, which prohibits various forms of interference with access to reproductive health services. Those courts have uniformly upheld the Act, on the theory that Congress has Commerce Clause power to prevent the obstruction of commercial transactions, even where the conduct proscribed by the statute is undertaken for non-economic motives. See, *e.g.*, *Hoffman* v. *Hunt*, 126 F.3d 575, 587 (4th Cir. 1997), cert. denied, 523 U.S. 1136 (1998); *Terry* v. *Reno*, 101 F.3d 1412, 1417 (D.C. Cir. 1996), cert. denied, 520 U.S. 1264 (1997); *United States* v. *Dinwiddie*, 76 F.3d 913, 920-921 (8th Cir.), cert. denied, 519 U.S. 1043 (1996); *United States* v. *Wilson*, 73 F.3d 675, 684-685 (7th Cir. 1995), cert. denied, 519 U.S. 806 (1996); *Cheffer* v. *Reno*, 55 F.3d 1517, 1520 n.6 (11th Cir. 1995).

devoted to commercial activity, or itself on the market for rent or sale. Provided that the link to commerce is close enough, Congress may regulate non-economic activity (such as violent crime) based on its anticipated interstate commercial effects.

B. The Effects On Interstate Commerce In This Case Were Specific And Concrete

In *Lopez*, this Court considered a constitutional challenge to the Gun-Free School Zones Act, former 18 U.S.C. 922(q) (Supp. V 1993), which generally proscribed the possession of guns in and near schools. The government contended that the Section 922(q) was a permissible exercise of congressional power under the Commerce Clause. The government argued that the conduct prohibited by the Section 922(q) bore a constitutionally sufficient nexus to interstate commerce because the presence of guns within school zones would disrupt the educational process, resulting in a less productive citizenry and (ultimately) in an impaired national economy. See 514 U.S. at 564.

In holding the statute to be invalid, this Court observed that Section 922(q) "contains no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession * * * affects interstate commerce." 514 U.S. at 561; see also *id.* at 562 (Section 922(q) "has no express jurisdictional element which might limit its reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce"). The Court also found the predictive chain described by the government to be too attenuated to serve as a basis for federal legislation under the Commerce Clause. It concluded that "[t]o uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power." *Id.* at 567.

In contrast to Section 922(q), Section 844(i) contains an express jurisdictional element that "limit[s] its reach" (*Lopez*, 514 U.S. at 562) to property that is "used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce." Petitioner argues (Br. 48), however, that in the present case "[t]he connections between the property and interstate commerce—much less between the potential effects of the crime and interstate commerce—are remote and insignificant in quality." He contends (Br. 44-50) that if Section 844(i)'s jurisdictional element is read to encompass such connections, the statute is unconstitutional.

Petitioner's constitutional claim is without merit. In this section, we show that the connections between petitioner's crime and interstate commerce are neither attenuated nor speculative. In the next section, we show that protection of the property of the type involved in this case bears a constitutionally sufficient nexus to interstate commerce, and thus renders a statute prohibiting the destruction of such property a permissible exercise of federal power.

1. Most obviously, the damage caused by the fire triggered a legal duty for a Wisconsin insurer to pay over $75,000 to persons in another State. The economic injury done to the insurer was no less substantial or concrete than if petitioner had set fire to the insurance company's offices. The directness of the injury is attested to by the fact that the sentencing court, in accordance with 18 U.S.C. 3664(j)(1) (Supp. IV 1998), ordered petitioner to pay restitution to the insurer. See

note 3, *supra*. The insurance company's right to restitution in the sentencing process is consistent with established equitable principles, under which the insurer could have filed a private civil action against petitioner to recoup the money paid on the Walkers' claim.[15] There is consequently no basis for petitioner's contention that the nexus between his own criminal conduct and the insurance company's pecuniary loss was too speculative or attenuated to warrant congressional concern.

The base offense defined by Section 844(i) is a crime against *property*: the prohibited act is the malicious "damage[] or destr[uction]," by specified means, of "any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce."[16]

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[15] "Subrogation is the right of the insurer to be put in the position of the insured in order to pursue recovery from third parties legally responsible to the insured for a loss paid by the insurer." 16 George J. Couch, *Couch on Insurance* § 61:1, at 75 (1983). It "is the mode which equity adopts to compel the ultimate discharge of the debt by him who, in good conscience, ought to pay it." *Id.* § 61:20, at 98. By fulfilling its contractual obligation to compensate the Walkers for their loss, the insurer in this case was subrogated to the Walkers' right of action (up to the amount of the claim paid) and could have pursued any claim against petitioner that the Walkers might have asserted. See, *e.g.*, *Phoenix Ins. Co.* v. *Erie & Western Transp. Co.*, 117 U.S. 312, 320-321 (1886); *Allstate Ins. Co.* v. *Mazzola*, 175 F.3d 255, 260-261 (2d Cir. 1999); *Commercial Union Ins.* v. *Bituminous Cas. Corp.*, 851 F.2d 98, 100-101 (3d Cir. 1988).

[16] Section 844(i) is often referred to as an "arson" statute, and arson is that Section's closest common-law analogue. Common-law arson, however, was an offense against the person. Although the potential for widespread property damage was in part responsible for the treatment of arson as an especially heinous crime, "[t]he primary purpose of common law arson was to preserve the security of the habitation [and] to protect the dwellers within the building from injury or death." John Poulos, *The Metamorphosis of the Law of Arson*, 51 Mo. L. Rev. 295, 299-300 (1986) (footnote omitted). Under the common-law conception of the arson offense, "the protection of [the occupant's] property interest was purely incidental to the protection afforded the dweller." *Id.* at 324. As arson statutes have developed over the years, however, the offense has been redefined (at least in significant measure) as a crime against property. See *id.* at 324-335. Section 844(i) is in keeping with that trend, while providing enhanced punishment when injury or death results from the crime.

The economic damage done by petitioner's crime was not an ancillary or peripheral consequence of the Section 844(i) violation: it was the very core of the offense. The incidence of that economic loss was borne by a commercial business headquartered in Wisconsin. And the insurer's loss was not the result of any fortuitous or unforeseeable chain of circumstances, but arose out of a pre-existing contractual arrangement. There is consequently nothing "attenuated or *de minimis*" (Pet. Br. 47) about the interstate commercial effect of petitioner's conduct. To the contrary, that effect was significant in dollars and cents; and petitioner's crime was the proximate cause of the insurer's loss.

2. Petitioner's crime also significantly threatened financial interests of the mortgage company. The mortgagee held a security interest in the property, and destruction of or damage to the residence would substantially impair the value of that security. The mortgagee therefore had a direct financial stake in the physical integrity of the Walkers' home. While the loss in this case was ultimately borne by an out-of-state insurer rather than the mortgagee, the fire created a significant *potential* risk to the mortgagee's financial

interests.[17] The mortgagee's property interest in the real estate, and its consequent financial stake in the physical integrity of the residence, were sufficient to make the house an appropriate subject of federal concern.

3. Finally, although the government's evidence at trial did not establish any actual effect on the Walkers' receipt of natural gas, the potential impact of the crime on gas deliveries provides an independent, concrete link to interstate commerce. Destruction of the house, or damage sufficient to cause prolonged vacancy, would have decreased the volume of gas delivered through interstate channels to the Walkers' residence. As the Seventh Circuit has explained, "straightforward economic analysis" supports the application of Section 844(i) to buildings receiving gas from out-of-state sources "because arsons that interrupt the interstate delivery of supplies affect the volume of interstate shipments of those supplies." *United States* v. *Hicks*, 106 F.3d 187, 190 (1997).

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[17] If the damage caused by petitioner's offense had not been covered by insurance, the mortgagee under general principles of property law would have had a cause of action against petitioner for the impairment of its security. Restatement (Third) of Property (Mortgages) § 4.6(d), at 263 (1997); *id.* cmt. b, at 265; *id.* cmt. h, at 275. The mortgagee's cause of action against a third party tortfeasor like petitioner is one aspect of its right to prevent or redress conduct (whether by the mortgagor or others) that diminishes the value of the mortgaged property and thereby impairs the mortgagee's security. See generally *id.* § 4.6, at 262-263.

C. Section 844(i)'s Jurisdictional Element Ensures That The Statute Is Limited To Property, And Offenses, Having A Constitutionally Sufficient Nexus To Interstate Commerce

1. The Court in *Lopez* made clear that congressional power under the Commerce Clause "may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government." 514 U.S. at 557 (quoting *Jones & Laughlin Steel*, 301 U.S. at 37). If Congress were authorized to regulate all activity that could theoretically have some distant downstream effect on interstate commerce, its powers would be effectively unlimited. See also *id.* at 567 ("There is a view of causation that would obliterate the distinction between what is national and what is local in the activities of commerce."). Section 844(i)'s jurisdictional element, consistent with its underlying constitutional source, must therefore be applied in a manner that distinguishes between crimes that are within the zone of federal power and those that are not.

The question, as *Lopez* perceived, "is necessarily one of degree." 514 U.S. at 566. While a constitutional boundary exists between "what is truly national and what is truly local," *id.* at 567-568, *Lopez* cautioned that efforts to capture the distinction "are not precise formulations, and in the nature of things they cannot be." *Id.* at 567. Criminal activity may have both intensely national and intensely local dimensions. The destruction of individual residences by arson surely has

a sharp and immediate effect on the victims and the local community. But the property that is damaged or destroyed by the crime also may be integrally tied to interstate commercial activity, whether through the legal and financial arrangements made for its purchase, sale, or protection, or through the demands it directly places on interstate resources. The Court has not endorsed the proposition that "Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities." *Lopez*, 514 U.S. at 558 (quoting *Maryland* v. *Wirtz*, 392 U.S. 183, 197 n.27 (1968)). But no such concern is raised by a law that protects the physical integrity of property, whether residential or commercial, based on its use in an activity affecting interstate commerce.[18]

Application of Section 844(i) on facts like the ones in this case therefore does not exceed constitutional bounds. An attempt to burn or destroy a home does not necessarily represent a simple local crime; rather, it can

[18] Application of Section 844(i) to petitioner's conduct does not create friction with state prerogatives. Congress has expressly disclaimed any intent to preempt state laws in this area absent a "direct and positive conflict" between federal and state law. 18 U.S.C. 848. Congress has recognized that the conduct prohibited by Section 844(i) is also criminal under state law. See, *e.g.*, *1970 House Hearings* at 72. It deliberately chose to create overlapping federal and state jurisdiction for crimes involving the destruction of property by fire and explosives, leaving it to prosecutorial officials to determine on a case-by-case basis whether a particular prosecution is most appropriately undertaken in state or in federal court. Such decisions typically involve cooperation between federal and state authorities and are rarely a source of conflict. See Harry Litman & Mark D. Greenberg, *Federal Power and Federalism: A Theory of Commerce-Clause Based Regulation of Traditionally State Crimes*, 47 Case W. Res. L. Rev. 921, 963-968 (1997).

and often will create a practical danger of interstate economic loss by invading the legally protected interests of out-of-state commercial actors. Congress is surely empowered to punish criminal acts against property when those acts directly expose identified out-of-state businesses to economic harms grounded in their contractual and legal interests. Proof that a residence received out-of-state natural gas also provides a basis for federal jurisdiction under Section 844(i). While a utility company typically has no legal entitlement to sell any particular volume of gas, and therefore suffers no actionable harm as a result of the offense, a reduction in the flow of interstate gas shipments is a readily foreseeable consequence of damage to or destruction of a dwelling supplied by interstate sources. The aggregate commercial effect of all such reductions would be substantial. A building's receipt of out-of-state natural gas thus provides an independent, constitutionally sufficient basis for the application of Section 844(i).[19]

2. As petitioner correctly observes (Br. 45), a court's role in applying a statute that contains a jurisdictional element differs from its role in implementing other

[19] Recognizing federal authority to protect buildings that have interstate utility links does allow a broad reach to federal power. If that nexus would extend federal jurisdiction to the destruction of most buildings, however, that is because the interstate economy reaches, and vitally depends on, commerce with those buildings. Acceptance of that proposition does not mean that Congress may regulate all violent crime against persons on the theory that all persons "consume" out-of-state goods and that injury to them would likely reduce such consumption. Rather, proof that a particular building receives out-of-state gas establishes that its destruction by fire or explosives will disrupt an ongoing and continuous commercial relationship, and will thereby inflict concrete economic harm on *identified* commercial actors.

Commerce Clause legislation. When "Congress itself has said that a particular activity affects the commerce, * * * the only function of courts is to determine whether the particular activity regulated or prohibited is within the reach of the federal power." *Darby*, 312 U.S. at 120-121. Thus, where Congress has defined a class of activity without reference to an "in commerce" or "affecting commerce" element, and has determined that all conduct within the class is prohibited, courts do not inquire case-by-case into interstate commerce connections. See *Perez*, 402 U.S. at 152-154.

By contrast, the purpose and function of an express jurisdictional element is to "limit [a statute's] reach to a discrete set of [activities] that additionally have an explicit connection with or effect on interstate commerce." *Lopez*, 514 U.S. at 562. Some jurisdictional elements do this by identifying particularized links to commerce that the government must prove.[20] See, *e.g.*, 18 U.S.C. 2119 (carjacking offense applies to a "motor vehicle that has been transported, shipped, or received

[20] This Court in *Lopez* cited with approval former 18 U.S.C. App. 1202(a) (1976) as an example of a statute limited "to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce." 514 U.S. at 562. That Section prohibited convicted felons from "receiv[ing], possess[ing], or transport[ing] in commerce or affecting commerce * * * any firearm." 18 U.S.C. App. 1202(a) (1976); cf. 18 U.S.C. 922(g). In *Scarborough* v. *United States*, 431 U.S. 563 (1977), this Court recognized that, under its prior decision in *United States* v. *Bass*, 404 U.S. 336 (1971), the government was required to prove some nexus to interstate commerce in order to establish the possession offense. See 431 U.S. at 567-568, 575. The Court found that the jurisdictional element was satisfied by proof that the firearm in question had moved in interstate commerce at some time in the past, *id.* at 575, explaining that "Congress intended no more than a minimal nexus requirement," *id.* at 577.

in interstate or foreign commerce"). Others, such as Section 844(i), mandate a case-by-case inquiry but under a standard that invokes the full sweep of Congress's "affecting commerce" power. In the latter instance, there are many ways by which the requisite connection to commerce may be shown.

In *Russell*, the Court identified the class of properties to which the property at issue in the prosecution belonged (rental property), and then determined that the class had a sufficient connection to interstate commerce to justify application of the statute. As the Court explained, "[t]he congressional power to regulate the class of activities that constitute the rental market for real estate includes the power to regulate individual activity within that class." 471 U.S. at 862 (citing *Perez*). It is also permissible to identify the particular connections to interstate commerce that the property at issue has and, when those connections are explicit and not attenuated, to ask whether the class of property having similar characteristics will in the aggregate have a "substantial relation" to interstate commerce. *Lopez*, 514 U.S. at 559. Either manner of proof ensures that the exertion of federal power against what might otherwise be viewed as a local crime serves to protect interstate commercial activity.

The requirement of a genuine connection between a particular property and interstate commercial activity does not mean that the government must prove an *actual effect* on interstate commerce in an individual Section 844(i) prosecution. Still less does it require a "substantial effect" on commerce on the facts of each case.[21] The nature of commerce is that a large number

[21] Requiring proof of a "substantial effect" on the facts of each case would require judicial line-drawing that would likely produce

of arguably insubstantial effects produce, in the aggregate, huge effects. Petitioner concedes (Br. 32-33) that effects on commerce may be aggregated to meet a constitutional substantiality requirement, but he would limit (Br. 34-35) that mode of analysis to circumstances involving commercial activity (and then only when intrastate and interstate activities are "commingled" or when regulation is "essential" or "appropriate" to prevent injury or disruption to commerce). There is no constitutional basis for that restriction. Congress may not trace the effects of non-commercial activity into the stream of commerce by piling "inference upon inference" in a highly attenuated fashion. *Lopez*, 514 U.S. at 567. That principle, however, does not bar regulation of non-commercial activity (such as violent crime) that *directly* affects interstate commerce (such as identified insurance companies and mortgage lenders) and that, in the aggregate, exerts a substantial effect on interstate commerce.

"The contention that in Commerce Clause cases the courts have power to excise, as trivial, individual instances falling within a rationally defined class of activities has been put entirely to rest." *Maryland* v. *Wirtz*, 392 U.S. at 192-193; accord *Perez*, 402 U.S. at 154. The Court has applied that principle both to

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arbitrary outcomes. Here, for example, the insurable interest in the property damaged by petitioner's crime was plainly "substantial"; the effect of the crime was to trigger the insurer's legal obligation to make a payment of more than $75,000 across state lines. There is no clear reason why the result should be different, however, if the damage were only $7,500 or $750, or if there were no damage at all because (as in *Russell*) the fire failed to catch. Petitioner's position would nevertheless require the courts to draw such impressionistic distinctions as a matter of constitutional law.

Commerce Clause statutes that contain a jurisdictional element and to those that do not. Compare *Wirtz*, 392 U.S. at 188-193 (applying principle to law containing a jurisdictional element) with *Perez*, 402 U.S. at 150-154 (same for statute that did not contain a jurisdictional element). That point clearly emerges from *Russell*, which upheld a Section 844(i) conviction for the *unsuccessful attempt* to set fire to a building. See 471 U.S. at 859 & n.1. By showing that the building was used as rental property, the government established the requisite nexus to commerce, even without proof that Russell's crime had any actual commercial effect. Similarly, proof that a residence is mortgaged to and insured by out-of-state businesses (and receives gas from out-of-state sources) shows that its destruction by fire would pose a significant risk of harm to interstate commerce. Protection of the home is therefore an appropriate subject of federal regulation, regardless of whether (or to what degree) the harms materialize in a particular case.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
JAMES K. ROBINSON
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
MALCOLM L. STEWART
Assistant to the Solicitor General
DAVID S. KRIS
Attorney

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In the Supreme Court of the United States

DEWEY J. JONES, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

**On Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit**

REPLY BRIEF FOR THE PETITIONER

DONALD M. FALK
Counsel of Record
SHARON SWINGLE
Mayer, Brown & Platt
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000

Counsel for the Petitioner

25 pp

TABLE OF CONTENTS

Page

REPLY BRIEF FOR THE PETITIONER 1

I. A PRIVATE RESIDENCE IS NOT "USED * * * IN ANY ACTIVITY AFFECTING INTERSTATE * * * COMMERCE" 2

II. THE COMMERCE POWER PROVIDES NO BASIS FOR PROHIBITING ARSON OF REAL PROPERTY NOT IN COMMERCIAL USE 7

A. The Application Of Section 844(i) To The Arson In This Case Would Extend Federal Regulation Of Intrastate Conduct Beyond The Limits Recognized By This Court 8

B. The Relation Between The Arson In This Case And Interstate Commerce Is Too Insubstantial To Support Federal Regulation Without Effectively Allocating Plenary Power Over Crime To The National Government 12

1. The United States Sidesteps The Governing Standard 13

2. The Effects Of Petitioner's Arson On Interstate Commerce Are Too Slight To Support Constitutional, Non-Plenary Federal Regulation 15

CONCLUSION 20

TABLE OF AUTHORITIES

Page(s)

Cases:

A.L.A. Schechter Poultry Corp. v. *United States*, 295 U.S. 495 (1935) 18-19

Allied-Bruce Terminix Cos. v. *Dobson*, 513 U.S. 265 (1995) 5

Bailey v. *United States*, 516 U.S. 137 (1995) 2, 6

City of Boerne v. *Flores*, 521 U.S. 507 (1997) 9

Edward J. DeBartolo Corp. v. *Florida Gulf Coast Trades Council*, 485 U.S. 568 (1988) 3, 4

FERC v. *Mississippi*, 456 U.S. 742 (1982) 12

Federal Power Comm'n v. *East Ohio Gas Co.*, 338 U.S. 464 (1950) 5

Heart of Atlanta Motel, Inc. v. *United States*, 379 U.S. 241 (1964) 10

Illinois Natural Gas Co. v. *Central Illinois Public Service Co.*, 314 U.S. 498 (1942) 5

Katzenbach v. *Morgan*, 384 U.S. 641 (1966) 9

Mandeville Island Farms, Inc. v. *American Crystal Sugar Co.*, 334 U.S. 219 (1948) 10

McLain v. *Real Estate Board, Inc.*, 444 U.S. 232 (1980) 5

Mitchell v. *Lublin, McGaughy & Assocs.*, 358 U.S. 207 (1959) 9

NLRB v. *Reliance Fuel Oil Corp.*, 371 U.S. 224 (1963) 3, 5

NLRB v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) 11, 12

TABLE OF AUTHORITIES — Continued

Page(s)

National Organization of Women v. *Scheidler*, 510 U.S. 240 (1994) 12

Perez v. *United States*, 402 U.S. 146 (1971) 9

Polish National Alliance v. *NLRB*, 322 U.S. 643 (1944) 5, 10

Russell v. *United States*, 471 U.S. 858 (1985) ..... *passim*

Santa Cruz Fruit Packing Co. v. *NLRB*, 303 U.S. 453 (1938) 8, 12

Smith v. *United States*, 508 U.S. 223 (1993) 6

United States v. *Coombs*, 37 U.S. (12 Pet.) 72 (1838) ... 16

United States v. *Darby*, 312 U.S. 100 (1941) 10

United States v. *Johnson*, No. 98-1696 (Mar. 1, 2000) *5*

United States v. *Lopez*, 514 U.S. 549 (1995) ..... *passim*

United States v. *Robertson*, 514 U.S. 669 (1995) 10, 11

United States v. *Ryan*, 41 F.3d 361 (8th Cir. 1994) (en banc), cert. denied, 514 U.S. 1082 (1995) 5

United States v. *Ryan*, 9 F.3d 660 (8th Cir. 1993), partly superseded, 41 F.3d 361 (1994) (en banc), cert. denied, 514 U.S. 1082 (1995) 6

United States v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944) 5

United States v. *Wrightwood Dairy Co.*, 315 U.S. 110 (1942) 11

Wickard v. *Filburn*, 317 U.S. 111 (1942) 11

TABLE OF AUTHORITIES — Continued

Page(s)

Statutes:

15 U.S.C. § 717 5

15 U.S.C. § 1601 *et seq.* 6

18 U.S.C. § 844(i) ..... *passim*

Miscellaneous:

116 CONG. REC. 35,359 (1970) 4

H.R. REP. NO. 91-1549 (1970) 3

REPLY BRIEF FOR THE PETITIONER

The government concedes (Br. 15) that "Congress * * * entrust[ed] the courts" to determine "whether particular kinds of property bear the requisite commercial nexus" to support application of Section 844(i). But the government asks this Court to jump straight to the constitutional issue, without properly considering whether the particular nexus that Congress specified is met. Although a firm delineation of constitutional limits may be desirable, it is not necessary here. Section 844(i) does not reach arson of a private residence.

The government's constitutional position is equally misguided. The government asserts (Br. 13) that the commerce power authorizes federal regulation of essentially all "crimes against property," because those crimes impose "predictable financial harms" on firms participating in the "interstate economy." When Congress regulates conduct that is neither interstate nor commercial, the risk of overstepping the bounds of the federal system is especially severe. Yet the government does not even try to identify a plausible dividing line "between what is truly national and what is truly local." *United States* v. *Lopez*, 514 U.S. 549, 567-568 (1995). The government does not adduce a single instance of conduct that, under its view, falls outside federal power to regulate arson. Cf. *id.* at 565. The extreme breadth of the government's position is not surprising, as only sweeping power could support the prosecution here.

The parties share some common ground, however. The government does not dispute that its expansive interpretation of the jurisdictional element in Section 844(i) renders meaningless the provision of Section 844, as enacted, that covered buildings used by federal agencies or recipients of federal funds. See Pet. Br. 22-23. The government also leaves untouched our extensive demonstration (*id.* at 20-22) that, under this Court's decisions and the many statutes using the same terms, the phrase "activity affecting interstate commerce" invariably refers to ***commercial*** activity by a business or similar enterprise, not transactions by isolated consumers. These points

foreclose a conclusion that Congress clearly intended to include arson of private residences within Section 844(i).

As for the constitutional question, the government does not dispute that the inclusion of a jurisdictional element cannot expand the commerce power. But that would be the result of the government's position here. And the government does not dispute that, under its view of the Commerce Clause (Br. 42 n.18), Congress could preempt state jurisdiction over the great bulk of crimes against property, so that only federal sufferance would permit the States to act in that core area of their sovereignty. For these and the other reasons discussed below, Section 844(i) cannot be applied constitutionally here.

The line to be drawn in this case is clear, whether it is drawn on statutory or constitutional grounds. Arson of property not used for any commercial activity is not a federal crime.

I. A PRIVATE RESIDENCE IS NOT "USED * * * IN ANY ACTIVITY AFFECTING INTERSTATE * * * COMMERCE"

The government misstates the question of statutory interpretation here. The question is not whether Section 844(i) "categorical[ly] exclu[des]" private residences from its scope (U.S. Br. 13; see *id.* at 19 n.6), but whether private residences come within the statute's terms in the first place. They do not.

A. The government tries to force the constitutional issue, claiming that Congress clearly intended Section 844(i) to encompass private residences, and that therefore this Court cannot construe the statute to avoid the significant constitutional question posed by such an assertion of federal power. In the government's view, when the words "affecting commerce" appear, this Court cannot analyze a jurisdictional element's other terms. But statutory interpretation begins with ***all*** the words of the statute. *Bailey* v. *United States*, 516 U.S. 137, 144-145 (1995). Even if the phrase "affecting interstate * * * commerce" in isolation might invoke constitutional limits, Section 844(i) does not reach all arson affecting commerce or

all property affecting commerce. Rather, as this Court has recognized, *Russell* v. *United States*, 471 U.S. 858, 862 (1985) the statute interposes additional limits: covered ***property*** must be "***used*** * * * in an ***activity*** affecting interstate * * * commerce." This Court should construe that entire phrase in context according to normal rules of construction, and reject the government's invitation to seize on one fragment to conclude that the statute reaches as far as the Constitution may permit.[1]

The government relies (Br. 16) on a statement in the 1970 House Report that "the term affecting * * * 'commerce' represents 'the fullest jurisdictional breadth constitutionally permissible under the Commerce Clause.'" H.R. REP. NO. 91-1549, at 70 (quoting *NLRB* v. *Reliance Fuel Oil Corp.*, 371 U.S. 224, 226 (1963)). But the government ignores the rest of that sentence, which limits the coverage of the "very broad provision" to "substantially all ***business*** property." 1970 House Report at 70 (emphasis added). Half a sentence in a committee report scarcely amounts to a clear statement of congressional intent that precludes prudent statutory construction — particularly when the second half of the sentence points the other way.

Interpreting Section 844(i) to exclude private residences does not "resurrect the 'business purposes' limitation." U.S. Br. 26. As the government acknowledges (*ibid.*), the "business purposes" language was dropped not to extend coverage to private residences, but in an effort to encompass public buildings used for non-profit enterprises such as "schools, police stations, and churches." Commercial "use" is broader than use "for business purposes." When residential real estate is rented, the physical property may not be used "for business purposes" in the normal sense, but it nonetheless is used in a commercial

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[1] The government suggests (Br. 17) that this Court narrowly construes statutes to avoid constitutional doubt only when facial invalidity is at stake. That is not so. *E.g.*, *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Trades Council*, 485 U.S. 568, 575 (1988) (narrowly construing statute where agency "construction of the statute, as applied in this case, poses serious [constitutional] questions").

"activity." The House Report shows that Congress still had "business property" in mind after deleting "business purposes."

The debates belie any congressional intent — much less clear intent — that Section 844(i) cover private residences. The government tries in vain (Br. 29) to explain away Chairman Celler's unambiguous statement, made in the final debate, "that the mere bombing of a private home would not be covered" by the statute because Congress sought to ensure that the legislation stayed within constitutional limits. 116 CONG. REC. 35,359 (1970). The government cites (Br. 26) some sentiment that residences "***ought*** to be covered" (emphasis added), but can produce no statement claiming that Section 844(i) ***did*** reach private residences. To the contrary, minutes before passing the bill, the House defeated an amendment designed to extend federal jurisdiction whenever "someone's residence was blown up." 116 CONG. REC. 35,359 (statement of Rep. Hungate). The proposal reflected a commonsense understanding that residences "frequently" would not be used in any activity affecting interstate commerce. *Ibid.*

B. Far from reflecting clear intent to encompass private residences — and thus forcing the constitutional issue, *DeBartolo*, 485 U.S. at 575 — the jurisdictional element cannot bear the meaning that the government would give it without departing from ordinary English. The government identifies three "activities" in which the Walker residence purportedly was "used": (1) the "underwriting and servicing of mortgage loans" (Br. 10); (2) "the underwriting and administration of casualty insurance" (Br. 21); and (3) "supplying natural gas" (Br. 22).[2] The Walker residence was not "used" in those activities under

[2] The government suggests that consuming natural gas is an activity affecting interstate commerce within the statute (Br. 10), and that even the "activities of the occupants within" the Walker home were *ipso facto* activities affecting interstate commerce because they affected "the volume of gas provided to the residence." *Id.* at 22. That reasoning would extend federal power to all human activity.

the "ordinary, commonsense meaning" of the term. *United States* v. *Johnson*, No. 98-1696, slip op. 4 (Mar. 1, 2000).

The government asks (Br. 23) this Court to interpret the word "used" in light of the breadth of the word "any" and the supposedly "settled legal significance" (Br. 17) of the words "affecting commerce." But the government is silent in the face of our demonstration (Pet. Br. 20-22) that only a business or similar enterprise is an "activity that affect[s] commerce, within the meaning of [this Court's] decisions" and Congress's prior usage. *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 276-277 (1995).[3] Being connected to a gas line, being insured, and being mortgaged are not "activities" of that or any other kind. See *United States* v. *Ryan*, 41 F.3d 361, 369-370 (8th Cir. 1994) (en banc) (Arnold, C.J., dissenting), cert. denied, 514 U.S. 1082 (1995).

The government tries (Br. 19-24) to throw a federal cloak around every action tangentially affecting the natural gas, mortgage lending, and insurance industries. But explicit federal regulation of these industries under the Commerce Clause has stopped well short of the scope the government would infer from the general terms used in Section 844(i).[4] It would be

[3] *E.g.*, *Allied-Bruce*, *supra* (pest control service); *Russell*, *supra* (rental); *Reliance Fuel*, *supra* (oil sales and distribution); *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944) (insurance); *Polish National Alliance* v. *NLRB*, 322 U.S. 643 (1944) (same); *McLain* v. *Real Estate Board, Inc.*, 444 U.S. 232 (1980) (real estate financing and sale); *Illinois Natural Gas Co.* v. *Central Illinois Public Service Co.*, 314 U.S. 498 (1942) (natural gas distribution).

[4] Federal regulation of natural gas has been confined to transportation and sales transactions before a pipeline delivers gas to the local main, a limit derived from this Court's Commerce Clause decisions. See *Federal Power Comm'n* v. *East Ohio Gas Co.*, 338 U.S. 464, 469-470 & n.10 (1950); 15 U.S.C. § 717. The Commerce Clause permits federal regulation of insurance "transactions," *South-Eastern Underwriters*, 322 U.S. at 552, not of any object that may be insured or any behavior that might affect insurance. Federal lending

bizarre to assume that, in an ***arson*** statute, Congress intended to expand the federal sphere in those fields.

The government's argument also ignores this Court's recent decisions recognizing that the word "used" denotes some kind of ***active*** employment. See Pet. Br. 18-20. The government's reluctance to confront *Bailey* speaks volumes. Indeed, the government's argument here resembles its failed contention in *Bailey* that a gun was "used" whenever its presence "emboldened[ed]" a drug dealer. 516 U.S. at 145. The government also avoids *Smith* v. *United States*, in which this Court construed "use" based on meanings that do not help the government here: "to convert to one's service" or "to derive service from." 508 U.S. 223, 229 (1993). To "derive service from" a building presupposes instrumental use of the physical facility. See Pet. Br. 18-20. Thus, the "proper inquiry is into the function of the building," *i.e.*, the "use of the structure itself." *United States* v. *Ryan*, 9 F.3d 660, 675 (8th Cir. 1993) (Arnold, C.J., dissenting), partly superseded, 41 F.3d 361 (1994) (en banc), cert. denied, 514 U.S. 1082 (1995).

The government makes much (Br. 20-21) of this Court's conclusion in *Russell* that rental property is "used" within the meaning of Section 844(i). But in *Russell* as in *Smith*, the property at issue was physically traded — handed over "as an item of barter" in *Smith*, 508 U.S. at 229, and its daily possession traded for a regular stream of rental payments in *Russell*.[5] "Renting" a building "to tenants" (*Russell*, 471 U.S. at 862) actively employs it in a commercial activity in a way that paying for it, insuring it, and heating it do not. Real property

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regulation under the Commerce Clause extends to conduct related to credit transactions, not to any act that affects any subject of or security for a loan. *E.g.*, 15 U.S.C. § 1601 *et seq*.

[5] The building owner in *Russell* "earned * * * income" from the "use" of the property and "treated it as business property for tax purposes." 471 U.S. at 859. Moreover, in *Russell* this Court did not have to consider construing Section 844(i) more narrowly to avoid constitutional issues, as no constitutional challenge was raised.

that is rented to tenants is not passively used as some kind of "investment resource" (U.S. Br. 11); rather, the structure — the thing that is burnt — is "used" as a situs of revenue-generating activity (*i.e.*, paid tenancy) and as a source of revenue. By contrast, pledging the property as collateral for a mortgage (see *id.* at 20) does not "use" the physical premises in an income-generating "activity" — much less in the type of business pursuit that Congress and this Court have considered activities that substantially affect interstate commerce. See note 3, *supra*; Pet. Br. 20-22. The discrete act of subjecting the property to a security interest may change its legal status, but does not "use" the property in an ongoing "activity."

The government cannot identify even a hint in the legislative history that passive receipt of interstate utilities, passive subjection of the property to a security interest, or the maintenance of insurance might be an "activity" for which property is "used." Much less can the government support its contention that, under Congress's intended meaning, the mortgage company "used" the residence to lend money on it, the insurance company "used" the home to insure it, and the gas company "used" the house to deliver gas to it. That is not how people talk, and not how statutes should be construed. In light of the constitutional doubt created by the government's sweeping interpretation, Section 844(i) should be construed more naturally to exclude private residences from its scope.

II. THE COMMERCE POWER PROVIDES NO BASIS FOR PROHIBITING ARSON OF REAL PROPERTY NOT IN COMMERCIAL USE

The government tries to excise "commerce" from the Commerce Clause. Rather than offer a "practical conception of commercial regulation," *Lopez*, 514 U.S. at 574 (Kennedy, J., concurring), the government treats this Court's precedents as abstractions, transforming the power to regulate commerce among the States into the power to regulate anything with economic significance. "The subject of federal power is still 'commerce,'" however, "and not all commerce but commerce

* * * among the several States." *Santa Cruz Fruit Packing Co.* v. *NLRB*, 303 U.S. 453, 466 (1938) (Hughes, C.J.). When Congress attempts to regulate "an activity beyond the realm of commerce in the ordinary and usual sense of that term," *Lopez*, 514 U.S. at 583 (Kennedy, J., concurring), the connections between that activity and interstate commerce must be especially "close and substantial * * * to justify federal intervention." *Santa Cruz Fruit*, 303 U.S. at 466. It is "essential to the maintenance of our constitutional system," *ibid.*, that the standard of substantiality prevent the Commerce Clause from serving as a means to plenary federal power. See *Lopez*, 514 U.S. at 566-568. That principle defeats the prosecution here.

A. The Application Of Section 844(i) To The Arson In This Case Would Extend Federal Regulation Of Intrastate Conduct Beyond The Limits Recognized By This Court

Because the inclusion of a jurisdictional element cannot expand the commerce power — a point the government does not dispute — the application of Section 844(i) to this case must fail. The Commerce Clause empowers Congress to regulate only "three broad categories of activity," *Lopez*, 514 U.S. at 558, none of which encompasses this case. First, Section 844(i) indisputably does not regulate a channel of interstate commerce. Second, as applied to a private residence, Section 844(i) does not "regulate" or "protect" any "instrumentalities of interstate commerce, or persons or things in interstate commerce," *Lopez*, 514 U.S. at 558, within the meaning of this Court's decisions. Third, the statute does not regulate "activit[y] having a substantial relation to interstate commerce," which this Court defines as "intrastate economic activity * * * that substantially affect[s] interstate commerce," *id.* at 558-559.

The government tries to blend and expand the second and third categories to confer federal power to protect any activity, commercial or not, that has some nexus to interstate commerce. But the Commerce Clause does not stretch so far.

1. In a novel argument, the government asserts (Br. 34) that Congress's authority to "protect the instrumentalities of interstate commerce, or persons or things in interstate commerce," somehow supports the exercise of the commerce power in this case. *Lopez*, 514 U.S. at 558. But not every "property having connections to interstate commerce" (Br. 34) comes within this power. Apparently taking its cue from *The Wizard of Oz*, the government likens (*ibid.*) the Walker residence to an "aircraft." Vehicles, bridges, train stations, and other transportation or communications infrastructure indeed are instrumentalities. See *Mitchell* v. *Lublin, McGaughy & Assocs.*, 358 U.S. 207, 212 (1959). Under a greatly expanded view, any place of business might be an instrumentality. But a private residence surely is not. Likewise, real property, which cannot move between the States, is not a "thing" in interstate commerce as that concept has been understood by this Court. Cf. *Perez* v. *United States*, 402 U.S. 146, 150 (1971) (prohibition of "thefts from interstate shipments" exemplifies this power).

That Congress may protect property that makes interstate commerce possible, and property that is flowing in interstate commerce, does not mean that it has power to protect all property the disposition of which has out-of-state effects. The former, recognized power is necessary and proper for the maintenance and control of interstate commerce, and is "congruen[t] and proportional[]" to the enumerated power. *City of Boerne* v. *Flores*, 521 U.S. 507, 520 (1997) (construing Fourteenth Amendment, Section 5); see *Katzenbach* v. *Morgan*, 384 U.S. 641, 651 (1966) (equating standards of Section 5 and the Necessary and Proper Clause). The latter is far afield from the interstate "commercial nexus" that, the government concedes (Br. 15), must undergird any exercise of the commerce power. Adverse effects on particular "financial interests" (*id.* at 39) do not threaten the conduct or integrity of interstate commerce.

2. The government asserts power to protect not just instrumentalities and things in interstate commerce, but activities that affect interstate commerce. Indeed, in this case, the

government claims that Congress can protect any property that affects any activity that affects interstate commerce, and thus can regulate any conduct (*e.g.*, arson) that affects property (*e.g.*, a residence) that affects an activity (*e.g.*, consumer behavior) that in some way affects interstate commerce.

The government carries a limited principle too far. Only the need to ***protect*** interstate commerce makes it at all necessary and proper for Congress to extend regulation to intrastate activities that merely ***affect*** interstate commerce, see *United States* v. *Darby*, 312 U.S. 100, 118 (1941); *Lopez*, 514 U.S. at 555, the third category of activities subject to federal regulation under the Commerce Clause, *id.* at 559. Thus, Congress can regulate an "intrastate economic activity" that "substantially affect[s] interstate commerce" if the activity, unregulated, could undermine federal promotion or regulation of interstate commerce. *Ibid.*; *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 257-258 (1964); *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U.S. 219, 232 n.11 (1948).

But application of Section 844(i) to the Walker residence does not permissibly regulate "purely intrastate commercial activities that nonetheless have substantial interstate effects." *United States* v. *Robertson*, 514 U.S. 669, 671 (1995). Under this third category, this Court has approved only regulations governing a ***way of doing business*** — *i.e.*, a commercial activity — that substantially affects interstate commerce. Arson — all that is ***regulated*** here — is not such an activity.

The government claims (Br. 11), however, that the commerce power "includes the power to regulate" any "intrastate ***non***commercial activity that substantially affects interstate commerce" (emphasis added). By contrast, this Court has treated the power to regulate activities "affecting commerce" in terms that recognize the limited, commercial subject matter of the Commerce Clause. This branch of the commerce power permits regulation of additional "aspects of commerce" such as the "conduct of an enterprise," *Polish National Alliance*, 322 U.S. at 647, 650, and similar "purely intrastate commercial activities." *Robertson*, 514 U.S. at 671. Congress's prerogatives extend to "numerous commercial activities that substantially affect interstate commerce," *Lopez*, 514 U.S. at 566, but the Court has not recognized general federal authority to regulate noncommercial activity based on its interstate repercussions.

In contending (Br. 33) that the regulated activity "need not itself be commercial," the government relies on cases that did involve regulation of commercial activity. Thus, in *Wickard* v. *Filburn*, this Court approved federal regulation of a commercial activity involving a commercial commodity — a limit on the production of a commodity (wheat) that could be traded in commerce, including production for use to feed other items of commerce (livestock and poultry) that might be sold. See 317 U.S. 111, 118-119 (1942). (The regulation did ***not*** govern end-use human consumption. See *id.* at 118.) Likewise, in *United States* v. *Wrightwood Dairy Co.*, 315 U.S. 110 (1942), the regulated activity was the interstate sale of milk; the activity regulated in *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), was employment in the production of steel and steel products.

In each of these cases, Congress subjected a mode of doing business to regulation. But no production, trade, service, or transportation is regulated here. To extend federal regulation to noncommercial intrastate conduct, based on the effects of that conduct on end-use consumption — or to protect a "resource" that simply has contractual value to interstate parties — would go far beyond *Wickard*. With or without a jurisdictional element, such regulation exceeds the commerce power.

The protective principle is not a separate and independent basis for additional federal regulation of any "violent noneconomic conduct that directly threatens property having connections to interstate commerce." U.S. Br. 34. The government tries to bootstrap one aspect of the protective principle on another, but Congress's authority to protect interstate commerce against burden or interruption does not permit the federal government to "protect" any property that may be used in an

"activity" that substantially affects commerce in any way, based simply on the interstate economic relationships that may touch upon that property. ***Any*** property has "connections to interstate commerce" (*ibid.*) if one looks hard enough, but that is not a sufficient basis for federal regulation.[6]

To accept the government's view would recognize federal power to enact national anti-vandalism and anti-burglary laws — not to mention laws against any violent crime committed against any customer or employee of any business. That, like the application of Section 844(i) in this case, would impermissibly extend Commerce Clause regulation to activity that is "only tangentially related to interstate commerce." *FERC* v. *Mississippi*, 456 U.S. 742, 758 n.23 (1982).

B. The Relation Between The Arson In This Case And Interstate Commerce Is Too Insubstantial To Support Federal Regulation Without Effectively Allocating Plenary Power Over Crime To The National Government

The government fails to come to grips with the Seventh Circuit's correct conclusion that the "pretty slight" connections here "don't establish a 'substantial' connection between this arson (or this residence) and interstate commerce." J.A. 41. The government insists (Br. 12) that "the connections between petitioner's crime and interstate commerce are neither attenu-

[6] By contrast, *National Organization of Women* v. *Scheidler*, 510 U.S. 249 (1994), involved extortion directed at shutting down commercial abortion services — an economic transaction aimed at "harming businesses" (*id.* at 260) — while the Freedom of Access to Clinic Entrances Act forbids purposeful efforts to block commercial transactions by enterprises engaged in interstate commerce. See U.S. Br. 35 n.14. The requirement of a purpose to obstruct or restrain commerce helps ensure that the link between the prohibited conduct and interstate commerce is substantial rather than tangential. *E.g.*, *Santa Cruz Fruit*, 303 U.S. at 465, 468-469; *Jones & Laughlin*, 301 U.S. at 40.

ated nor speculative," but they are not substantial under this Court's analysis.

1. *The United States Sidesteps The Governing Standard*

a. The government avoids contending that the relation between the conduct in this case and interstate commerce is substantial, as this Court requires, *Lopez*, 514 U.S. at 559, but rather seeks to meet a less-demanding standard of "significant" connection. Petitioner's arson does not pass the government's own test, however, which would require "intrastate violence" to be "connected in a ***significant*** way with ***commercial transactions***" before being subject to federal regulation. U.S. Br. 35 (emphasis added). Arson of the Walker residence — a building not used for any business or other public, commercial activity — was not significantly connected with any commercial transaction. It thus fails even the government's test unless ***all*** violence that in some way affects interstate economic interests satisfies the standard. By that measure, federal power extends to the mugging of anyone whose ability to pay a mortgage or a credit card balance is affected, whose medical bills are paid by an interstate insurer, or whose interstate employer is economically harmed by the victim's absence.

Indeed, the only "significance" of arson to interstate commerce that the government identifies (Br. 39) is the mere cost of the crime in "dollars and cents" to out-of-state parties. This Court rejected similar "costs of crime" reasoning in *Lopez*, 514 U.S. at 564, for the good reason that it erases all meaningful limits on federal power. All crime is expensive, but the interstate diffusion of that expense does not render it subject to federal regulation under the Commerce Clause. See *ibid.*[7]

[7] Where the qualitative connections to interstate commerce are as slight as those here, the quantitative effects would have to be gargantuan to render them sufficiently substantial, standing alone, to justify federal regulation. The relatively modest $75,000 of damage caused in this case (Br. 46 n.21) cannot make up for the remoteness of the relation between the regulated act and interstate commerce.

b. Although the government must place full constitutional weight on the jurisdictional element, it tries to avoid the required "case-by-case" inquiry. *Lopez*, 514 U.S. at 561. The government insists (Br. 13) that it need not "prove an actual effect on interstate commerce in every Section 844(i) prosecution" (emphasis omitted), and also claims (Br. 45 & n.21) that the effects on interstate commerce of a particular crime need not be substantial. But the jurisdictional element in a statute must ***demonstrate*** the constitutional tie between the subject of regulation and interstate commerce. Effects on interstate commerce need not be realized; attempts can be punished. Nonetheless, the particular effects on interstate commerce that confer jurisdiction must be of the type that would justify regulation under normal Commerce Clause analysis.

Contrary to the government's contention (Br. 44), Congress in this case did indeed "identify[a] particularized link[] to commerce that the government must prove" in each case. If an arson is to come within federal authority, the burned property must be used in an activity affecting interstate commerce in such a way that the arson of that property substantially affects interstate commerce (and thus is an activity that can be regulated under the Commerce Clause, see *Lopez*, 514 U.S. at 559).

The government claims (Br. 45 n.21) that "arbitrary outcomes" would result from requiring proof of a substantial effect on commerce in every individual case. But that is the constitutional role of a jurisdictional element, and is the only way to ensure constitutional application of a statute that plainly could not stand without a jurisdictional limitation. Section 844(i), like other such laws, relies on its "jurisdictional element" to "ensure, through case-by-case inquiry, that" the conduct "in question affects interstate commerce." *Lopez*, 514 U.S. at 561. If a "case-by-case inquiry" does not demonstrate the activity's substantial effect on interstate commerce, there is no basis for federalizing an intrastate crime, since there is no other source for the substantial effect on commerce that permits federal regulation. The government argues, in effect, that lacking a sufficiently close relation between the crime of arson and

interstate commerce in general, it should not have to show a substantial effect in a particular case either. To the contrary, requiring proof of a ***qualitatively*** substantial effect on commerce by the regulated conduct does not lead to "arbitrary outcomes," but to constitutional ones.

2. *The Effects Of Petitioner's Arson On Interstate Commerce Are Too Slight To Support Constitutional, Non-Plenary Federal Regulation*

a. The government does not seriously contend that petitioner's arson substantially affected interstate commerce, but principally argues (Br. 43-46) that the effects of all arson, aggregated together, have a sufficiently substantial effect to pass constitutional muster. The government cannot rely on any aggregation principle here.

Although the government complains that ***we*** "would limit" aggregation "analysis to circumstances involving commercial activity" (Br. 46), it is the decisions of this Court that have drawn that clear line between intrastate conduct that may be aggregated to support federal regulation and conduct that may not: the aggregation device covers only "regulations of ***activities that arise out of or are connected with a commercial transaction***, which viewed in the aggregate, substantially affects interstate commerce." *Lopez*, 514 U.S. at 561 (emphasis added). That is, only commercial activities that are the ***subject of regulation*** may be aggregated to justify regulation under the Commerce Clause. See Pet. Br. 30-44. The government cannot identify a single constitutional decision of this Court in which ***non***commercial activities were aggregated.

To compensate for this deficiency, the government again tries (Br. 33-36, 45) to stretch *Russell* beyond its limits — and the limits of the Constitution. First, the government mischaracterizes *Russell* as a constitutional decision, but Congress's power was not challenged in that case. Second, the government asserts that in *Russell* this Court approved federal regulation of "the class of activities that constitute the rental market for real estate." Br. 33 (quoting 471 U.S. at 862). But the government

cannot and does not explain how Section 844(i) regulates "the rental market for real estate," and, in any event, the Walker residence was not rented. Indeed, the government does not claim that Section 844(i) is part of any general regulation of interdependent commercial transactions like the regulatory regimes in *Wickard* and other cases. *Russell* provides no basis for extending the aggregation principle to the regulation of non-commercial activity.

b. The government concedes that the Commerce Clause may not be applied in a way that "would effectually obliterate the distinction between what is national and what is local and create a completely centralized government." Br. 41 (quoting *Lopez*, 514 U.S. at 557). The jurisdictional element of Section 844(i) accordingly must be applied in a way that separates crimes that substantially affect interstate commerce, and come within federal power, from those that do not. See *Lopez*, 514 U.S. at 561-562. But the government's view leaves nothing significant on the non-federal side of the line.

Here, as in *Lopez*, the government's position makes it "difficult to perceive any limitation on federal power" in "criminal law enforcement * * * where States have been historically sovereign." 514 U.S. at 564. Unwilling to volunteer a single example of an arson that would not be covered under Section 844(i), the government does not try to demonstrate any limits on its conception of the commerce power, but asks this Court to take its word that there are limits somewhere. Acquiescence would abdicate the Court's duty to declare the limits of congressional power. *Id.* at 566; *United States* v. *Coombs*, 37 U.S. (12 Pet.) 72, 75 (1838) (Story, J.).

The government seems to believe that the commerce power is heightened whenever it is directed at property — even the most local of property — and that, if "economic damage" is "the very core of [an] offense" (Br. 39), Congress can prohibit it if any of the loss is borne outside of the State in which the property is located. The government contends (Br. 42) that federal power to regulate real property may rest on "legal and

financial arrangements made for its purchase, sale, or protection, or through the demands it directly places on interstate resources" (though the "demands" are not those of property, but of people engaging in commercial transactions).

If connections like this support assertion of the commerce power, similar reasoning would permit federal, potentially exclusive regulation of all, or nearly all, property crimes and crimes of violence. "Economic damage" is at the core of all property crimes, from robbery and burglary; to theft, embezzlement, and fraud; to malicious mischief and arson. Property of any consequence has some interstate nexus, either in its manufacture, its replacement, or its financing, while almost all individuals are engaged in interstate transactions that would be affected in some way by injury or death. In the government's view (Br. 42), not only setting fires, but breaking the window of any house in the United States could be a federal crime, because the Commerce Clause would include the power to protect the "physical integrity of property * * * based on its use in an activity affecting interstate commerce." Indeed, the government does not dispute that its view would support federal zoning regulations under the Commerce Clause, and federal prohibition of damage to items purchased on a revolving account or credit card. See Pet. Br. 25, 41.

The government asserts (Br. 43 n.19) that its position, while permitting federal regulation of basically all real property on the ground that "the interstate economy reaches, and vitally depends on, commerce with those buildings," nonetheless "does not mean that Congress may regulate all violent crime against persons on the theory that" injury to those persons "would likely reduce" their consumption of out-of-state goods. But the government is at a loss to say why not. It says only that the crime in this case "will disrupt an ongoing and continuous commercial relationship" with "***identified*** commercial actors" (*ibid.*) but the same reasoning would apply to crimes against most people as well. People have credit cards (and mortgages, and Book-of-the-Month Club memberships) that reflect ongoing relationships with "identified commercial actors"; they

are employed by "identified commercial actors"; they purchase food and utilities from "identified commercial actors." The government's rationale would permit federal regulation of any conduct that might affect any ***person*** engaged in any activity affecting interstate commerce and (under the government's broad view) almost everyone is so engaged.

c. The government's limitless conception of federal power to regulate property is necessary to its prosecution of this case, given the tangential connections between this arson and interstate commerce. The government maintains that the existence of a natural gas connection alone is enough to support exercise of the commerce power. But no element of its argument withstands scrutiny. It is well-established that interstate commerce in natural gas stops at the local main, see note 4, *supra*, rendering the effect on interstate commerce in this case trivial and severely attenuated.[8] The government also concedes (Br. 43) that a utility company — an ***intrastate*** entity here — "suffers no actionable harm as a result" of the burning of its customer's property. The only identified basis for federal regulation is the "aggregate commercial effect of all * * * reductions" in the flow of interstate gas shipments resulting from arson (*ibid.*), but aggregation is not available.

The interstate risk-spreading of insurance provides no more substantial basis for validating the application of Section 844(i) here. See *Lopez*, 514 U.S. at 564. The "pre-existing contractual arrangement" on which the government relies (Br. 39) had nothing to do with the conduct regulated here.[9] If merely

[8] If interruption of utility service is a sufficiently substantial effect on interstate commerce to support federal regulation, then Congress could regulate how and when individuals move their residence from one structure to another (because of arson or otherwise) — or children set out on their own — or those with second homes may or must open up or shut down each residence. That conduct has demonstrable interstate effects under the government's theory.

[9] In grasping for "distant repercussions" on interstate commerce, *A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495, 554

causing "economic injury" to an out-of-state insurer by "trigger[ing]" a pre-existing "legal duty" brings third-party conduct within the federal purview (*id.* at 37), then the Commerce Clause permits imposition of a federal substantive law governing contracts and torts involving citizens of different States.

No less sweeping in its implications is the government's contention (Br. 39) that the "threatened financial interests" of an out-of-state entity provide a constitutional nexus. An activity's incidental effects on a financial relationship with out-of-state actors does not bestow federal power to regulate the activity, even if there might be power to regulate the underlying commercial transaction. If a security interest is enough to impose federal regulation over anything done to or with the secured property, federal regulation might extend to any conduct involving any property bought on an installment plan. Indeed, the government suggests (Br. 40) that out-of-state ownership of property justifies federal regulation of the property itself and any conduct affecting it. That cannot be right.

The government conflates acts that may cost interstate ***parties*** some money with acts "that can be expected to have a * * * direct deleterious effect on interstate ***commerce***." U.S. Br. 12 (emphasis added). But the Constitution's solicitude for the "legally protected interests of out-of-state commercial actors" (*id.* at 43) appears in the diversity jurisdiction provided in Article III, not in the Commerce Clause.

At a minimum, where property must provide the jurisdictional nexus for regulation under the Commerce Clause, and the property is not an instrumentality of commerce or traveling in commerce, federal power should extend only to property that is used in an income-generating enterprise in or substantially affecting interstate commerce. That test, which encompasses the "building used in profit-making activities" (U.S. Br. 33) in

(1935) (Cardozo, J., concurring), the government also strays from the sole commercial nexus recognized in the statute — the use of the property.

Russell, but not the Walker residence, ensures a "***genuine*** connection between a particular property and interstate ***commercial*** activity" (*id.* at 45) (emphasis added).

* * * * *

The government itself concludes (Br. 47) that, if interstate commerce touches every home — as it surely does every home that has heat, electricity, mail delivery, telephone service, a mortgage, or insurance — "[p]rotection of the home is * * * an appropriate subject of federal regulation." That statement starkly exposes the government's effort to assert federal power of what should be unimaginable breadth. Affirmance in this case necessarily would endorse that vision of federal preeminence in the enforcement of general criminal laws.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

DONALD M. FALK
Counsel of Record
SHARON SWINGLE
Mayer, Brown & Platt
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000

Counsel for the Petitioner

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In the
Supreme Court of the United States

DEWEY J. JONES,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF REVERSAL

ANNE M. HAYES
Counsel of Record
M. REED HOPPER
Pacific Legal Foundation
10360 Old Placerville Road,
Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932

Counsel for Amicus Curiae
Pacific Legal Foundation

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QUESTION PRESENTED

Whether in light of *United States v. Lopez*, 514 U.S. 549 (1995), and the interpretive rule that constitutionally doubtful constructions should be avoided, *see Edward J. DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council*, 485 U.S. 568, 575 (1988), Section 844(i) applies to the arson of a private residence; and if so, whether its application to the private residence in the present case is constitutional.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES v

INTEREST OF AMICUS CURIAE 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 3

ARGUMENT 6

I. CONSISTENT WITH *LOPEZ*, A FEDERAL COMMERCE CLAUSE ENACTMENT MAY ONLY REACH MATTERS THAT "SUBSTANTIALLY AFFECT" INTERSTATE COMMERCE; THUS, A FEDERAL STATUTE CONTAINING A JURISDICTIONAL ELEMENT APPLIES ONLY TO THOSE CASES WHERE THE FEDERAL GOVERNMENT CAN FACTUALLY DEMONSTRATE THAT THE CONDUCT IN QUESTION SUBSTANTIALLY AFFECTS INTERSTATE COMMERCE 6

A. Statutes Containing a Jurisdictional Element Must Meet the "Substantially Affects" Standard, Because Any Lesser Standard Would Nullify This Court's Decision in *Lopez* 6

TABLE OF CONTENTS—Continued

Page

1. Congress May Regulate Activities That "Substantially Affect" Interstate Commerce, Not Activities That Merely "Affect" Interstate Commerce; Therefore, Any Statute, Whether or Not It Contains a Jurisdictional Element, Must Meet This Constitutional Minimum 10

2. The Arson in This Case Does Not Meet the Statute's Requirement That the Property Be Used in Commerce or in an Activity That Affects Interstate Commerce 13

B. By Its Own Terms, a Statute with a Jurisdictional Element May Not Be Aggregated with Unconnected Cases; the Statute May Only Be Applied Where the Specific Facts of a Case Demonstrate the Requisite Connection to Interstate Commerce 16

II. FOR JURISDICTIONAL ELEMENT STATUTES, FEDERAL JURISDICTION MAY ONLY REACH CONDUCT WITH DIRECT AND SUBSTANTIAL EFFECTS ON INTERSTATE COMMERCE AND MAY NOT REACH INTRASTATE CONDUCT THAT IS MORE PROPERLY THE SUBJECT OF THE STATE'S GENERAL POLICE POWER 19

TABLE OF CONTENTS—Continued

Page

A. This Court Should Hold That, for Jurisdictional Element Statutes, Substantial Effects May Only Be Met by Explicit and Direct Connections to Interstate Commerce ... 19

B. In Construing Jurisdictional Element Statutes, This Court Should Adopt a Rule of Construction That Gives Wide Latitude to the States in the Formulation of Civil and Criminal Policy with Respect to Internal Matters, and Sustain Federal Jurisdiction Only Where Federal Commerce Interests Are Manifest 24

CONCLUSION 29

TABLE OF AUTHORITIES

Page

Cases

Ace Auto Body & Towing, Ltd. v. City of New York, 171 F.3d 765 (2d Cir. 1999) 18-19

Alden v. Maine, 119 S. Ct. 2240 (1999) 1

Gregory v. Ashcroft, 501 U.S. 452 (1991) 29

Hodel v. Virginia Surface Mining and Reclamation Association, Inc., 452 U.S. 264 (1981) 1

Jones v. United States, 68 U.S.L.W. 3321 (U.S. Nov. 15, 1999) (No. 99-5739) 3

National Association of Home Builders v. Babbitt, 130 F.3d 1041 (D.C. Cir. 1997) 19

Printz v. United States, 521 U.S. 898 (1997) 1

Reno v. Condon, cert. granted, 119 S. Ct. 1753 (1999) 1

Russell v. United States, 471 U.S. 858 (1985) 22-23

Scarborough v. United States, 431 U.S. 563 (1977) 22

Solid Waste Agency of Northern Cook County v. Army Corps of Engineers, 191 F.3d 845 (7th Cir. 1999) 19

United States v. Bishop, 66 F.3d 569 (3d Cir. 1995) 21

United States v. Capo, 817 F.2d 947 (2d Cir. 1987) 28-29

TABLE OF AUTHORITIES—Continued

Page

United States v. Denalli, 73 F.3d 328, *modified on reh'g*, 90 F.3d 444 (11th Cir. 1996) 8-9, 15

United States v. Johnson, 1999 WL 988249, *4 (5th Cir. 1999) 9, 16-17, 22-23

United States v. Jones, 178 F.3d 479 (7th Cir. 1999) 2, 9, 15-17

United States v. Latouf, 132 F.3d 320 (6th Cir. 1997) 17

United States v. Lewis, 100 F.3d 49 (7th Cir. 1996) 12

United States v. Lopez, 514 U.S. 549 (1995) 1-14, 18-27, 29

United States v. McGuire, 178 F.3d 203 (3d Cir. 1999) 15, 18, 20-21, 24-25

United States v. Melina, 101 F.3d 567 (8th Cir. 1996) 11, 16

United States v. Morrison, consolidated with Brzonkala v. Morrison, cert. granted, 68 U.S.L.W. 3177 (1999) 1

United States v. Nguyen, 117 F.3d 796 (5th Cir. 1997) 23

United States v. Oliver, 60 F.3d 547 (9th Cir. 1995) 21

United States v. Ornelas, 841 F. Supp. 1087 (D. Colo. 1994) 27

United States v. Pappadopoulos, 64 F.3d 522 (9th Cir. 1995) ..... passim

TABLE OF AUTHORITIES—Continued

Page

United States v. Rea, 169 F.3d 1111 (8th Cir. 1999) 8

United States v. Tocco, 135 F.3d 116 (2d Cir. 1998) 8

United States v. Viscome, 144 F.3d 1365 (11th Cir. 1998) 9

United States v. Woodruff, 122 F.3d 1185 (9th Cir. 1997) 8

U.S. Constitution

Article I, Section 8, Clause 3 6

Statutes

18 U.S.C. § 2119 21

§ 844 2

§ 844(i) ..... passim

§ 922(g)(1) 21-22

§ 922(q)(2)(A) 11-12

Rules

Supreme Court Rule 37.3 1

Rule 37.6 1

INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.3, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of reversal.[1] Written consent for amicus participation in this case was granted by counsel of record for all parties.

Pacific Legal Foundation is the largest and most experienced nonprofit public interest law foundation of its kind in America. Founded in 1973, PLF provides a voice in the courts for mainstream Americans who believe in limited government, private property rights, individual freedom, and free enterprise. PLF litigates nationwide in state and federal courts with the support of thousands of citizens from coast to coast. PLF is headquartered in Sacramento, California, and has offices in Miami, Florida; Honolulu, Hawaii; Bellevue, Washington; and a liaison office in Anchorage, Alaska.

PLF has participated in numerous cases concerning the scope of the Commerce Clause, federalism, and the constitutionality of various provisions of federal law. For example, PLF participated as amicus curiae before this Court in *Alden v. Maine*, 119 S. Ct. 2240 (1999); *Printz v. United States*, 521 U.S. 898 (1997); *United States v. Lopez*, 514 U.S. 549 (1995); and *Hodel v. Virginia Surface Mining and Reclamation Association, Inc.*, 452 U.S. 264 (1981), and is appearing as amicus curiae before the Court this term in *Reno v. Condon, cert. granted*, 119 S. Ct. 1753 (1999); and *United States v. Morrison, consolidated with Brzonkala v. Morrison, cert. granted*, 68 U.S.L.W. 3177 (1999).

PLF seeks to augment the arguments of Petitioners by further elucidating the inherent limitations on Congress'

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[1] Pursuant to Supreme Court Rule 37.6, Amicus Curiae Pacific Legal Foundation affirms that no counsel for any party in this case authored this brief in whole or in part; and, furthermore, that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

Article I authority under the Constitution. PLF believes its public policy perspective and litigation experience dealing with constitutional law will provide a unique viewpoint on the issues presented in this case. PLF believes this additional viewpoint will aid this Court in the resolution of this case.

STATEMENT OF THE CASE

Title 18, U.S.C. § 844, prescribes a federal criminal penalty for

> [w]hoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce . . . .

18 U.S.C. § 844(i). Petitioner Dewey Jones was convicted under this statute and sentenced to 35 years in federal prison for throwing a lit Molotov cocktail into his cousin's home. *See United States v. Jones*, 178 F.3d 479 (7th Cir. 1999). The connections to interstate commerce relied upon by the federal government were: (1) the house received natural gas that had traveled interstate; (2) the mortgage on the house was held by an out-of-state lender; and (3) the house was insured by an out-of-state insurer. *Id.* at 480.

Mr. Jones challenged his conviction, averring that his conduct could not be subject to federal prosecution because it lacked the requisite connection to interstate commerce. *Id.* at 479-80. The essence of his argument was that the statute could not be constitutionally applied to a residence *per se*, where the residence was not used in any commercial capacity. *Id.*

The United States Court of Appeals for the Seventh Circuit disagreed. The Seventh Circuit found that this Court's decision in *United States v. Lopez* required a showing that the statute regulate an activity that "substantially affects" interstate

commerce. And though it acknowledged that the asserted connections to interstate commerce were "pretty slight," *id.* at 480, it upheld the conviction, finding that the aggregated effects of supplying goods and services to homes, as well as the aggregate effects of arsons of houses, "substantially affect" interstate commerce within the meaning of *Lopez*. *Id.* at 480-81.

Mr. Jones petitioned this Court for a Writ of Certiorari. This Court granted the writ on November 15, 1999, *Jones v. United States*, 68 U.S.L.W. 3321 (U.S. Nov. 15, 1999) (No. 99-5739), to resolve a conflict among the circuits.

SUMMARY OF ARGUMENT

In *United States v. Lopez*, 514 U.S. 549 (1995), this Court held that Congress' Article I power "[t]o regulate commerce . . . among the several states" allowed Congress to regulate interstate commerce directly, or those activities that "substantially affect" interstate commerce. Further, this Court held that one way Congress could meet the "substantially affects" standard was by including a "jurisdictional element" in a statute that "would ensure, through case-by-case inquiry, that the [conduct] in question [substantially] affects interstate commerce." *Lopez*, 514 U.S. at 561.

The federal arson statute, 18 U.S.C. § 844(i), contains a jurisdictional element. Specifically, it prescribes a federal criminal penalty against any person who burns "property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce." *Id.* Despite the deceptively direct wording of this statute, there is considerable confusion among the lower courts as to what this statute regulates, and, in particular, how this Court's decision in *Lopez* affects the analysis of jurisdictional element statutes.

First, the lower courts disagree as to whether, after *Lopez*, jurisdictional element statutes require the government to show

"substantial effects" in order to sustain a federal prosecution, or whether *de minimis* effects on commerce suffice. Second, they disagree as to how the requisite connections to interstate commerce may be demonstrated in order to satisfy *Lopez*. And third, there is confusion as to what jurisdictional element statutes require in order to establish sufficient connections to interstate commerce in a given application.

As demonstrated below, because *Lopez* established, as a constitutional minimum, that Congress may only regulate those activities that "substantially affect" interstate commerce, conduct regulated under jurisdictional element statutes must similarly meet this requirement in order for the regulation to be constitutional. Any lesser standard would nullify the holding in *Lopez*--that is, if Congress could reach activities that only minimally affect interstate commerce through the employment of jurisdictional elements, it would be able to regulate matters that *Lopez* expressly held were beyond the reach of federal commerce authority.

Where Congress employs a jurisdictional element in a statute, Congress has made a policy choice to reach particular conduct that affects interstate commerce in a particular way. In construing such statutes, it is essential that courts interpret and apply these laws by reference to what, exactly, Congress sought to regulate. In particular, courts must take care that the interstate commerce connections identified by the federal government in seeking prosecutions under these statutes are consistent with the cast of the particular statute being applied. For example, in the federal arson statute, Congress did not seek to regulate *arsons* that affected commerce; rather Congress sought to regulate the arson of *properties used in* interstate commerce or used in activities affecting interstate commerce.

Further, in reviewing cases dealing with jurisdictional element statutes, courts must determine whether the application of the statute is sufficiently connected to interstate commerce on

its own facts, without reference to external facts or, especially, the aggregated effects of all similar conduct. By their own terms, jurisdictional element statutes are intended to reach a discrete subset of conduct that bears the requisite connections to interstate commerce; consequently, looking outside of the facts of a particular case defeats the entire purpose of the jurisdictional element and, more, contradicts the congressional intent to *limit* the reach of such statutes.

In order to meet the "substantial effects" standard established by *Lopez*, legitimate applications of jurisdictional element statutes ought to be limited to those cases in which the connections between the regulated conduct and interstate commerce are explicit and direct. This Court should find it constitutionally inadequate to uphold federal authority over noncommercial conduct where impacts on interstate commerce are trivial, speculative, or attenuated.

Finally, jurisdictional element statutes, by definition, attempt to regulate conduct that is not otherwise subject to federal regulation by creating a federal case only where federal interstate commerce interests are readily apparent. Consistent with this understanding, this Court should adopt a rule of construction that gives appropriate deference to the role of the states in governing matters that properly fall within their internal affairs, of which criminal law enforcement is a critical component. Accordingly, federal jurisdictional element statutes should be interpreted to reach only those cases where the federal interest in protecting interstate commerce from injurious or pernicious impacts is manifest.

With these considerations in mind, amicus respectfully requests that this Court REVERSE the decision of the court below.

ARGUMENT

I

CONSISTENT WITH *LOPEZ*, A FEDERAL COMMERCE CLAUSE ENACTMENT MAY ONLY REACH MATTERS THAT "SUBSTANTIALLY AFFECT" INTERSTATE COMMERCE; THUS, A FEDERAL STATUTE CONTAINING A JURISDICTIONAL ELEMENT APPLIES ONLY TO THOSE CASES WHERE THE FEDERAL GOVERNMENT CAN FACTUALLY DEMONSTRATE THAT THE CONDUCT IN QUESTION SUBSTANTIALLY AFFECTS INTERSTATE COMMERCE

A. Statutes Containing a Jurisdictional Element Must Meet the "Substantially Affects" Standard, Because Any Lesser Standard Would Nullify This Court's Decision in *Lopez*

Article I, Section 8, Clause 3, of the United States Constitution grants Congress the power "[t]o regulate commerce . . . among the several states." In *United States v. Lopez*, this Court reaffirmed that there were "three broad categories of activity that Congress may regulate under its commerce power." *Lopez*, 514 U.S. at 558. The first category of activity that Congress may regulate is the use of the channels of interstate commerce. *Id.* Second, Congress may regulate and protect instrumentalities of interstate commerce, or persons or things in interstate commerce. *Id.* And finally, this Court held that Congress could regulate those activities that "substantially affect" interstate commerce." *Id.* at 559.

It is the last category of activities--those that "substantially affect" interstate commerce--that concerned this Court in *Lopez* and concerns the Court here. In analyzing how a statute could meet the "substantially affects" standard in *Lopez*, this Court explicitly recognized that a statute could be upheld as within Congress' Commerce Clause authority if it contained a "juris-

dictional element which would ensure, through case-by-case inquiry, that the [regulated activity] in question affects interstate commerce." *Id.* at 561-62. Section 844(i), the statute at issue here, contains a jurisdictional element. Specifically, this statute reaches only an arson that targets "real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce." 18 U.S.C. § 844(i). Because the statute contains a jurisdictional element, the statute, on its face, may withstand a constitutional challenge. But what is at issue here is *which applications of the statute* can similarly withstand constitutional challenge.

In *Lopez*, this Court expressly placed jurisdictional element statutes within the category of congressional regulations that must satisfy the "substantially affects" standard. However, there is significant disagreement among the courts of appeals--and among the justices within individual courts of appeals--as to whether or how the "substantially affects" standard applies with respect to jurisdictional element statutes. For example, the Ninth Circuit, in *United States v. Pappadopoulos*, 64 F.3d 522 (9th Cir. 1995), found that the "substantial effects" standard was applicable to the arson statute at issue here:

> *Lopez* clearly holds that the connections to or effect on interstate commerce must be "substantial." The question is whether its analysis should be applied when the issue is how significant the contacts to interstate commerce must be in individual cases in order to assure the constitutionality of a statute that relies on a jurisdictional element. We hold that it does. We conclude that in a case such as this, where Congress seeks to regulate a purely intrastate noncommercial activity that has traditionally been subject to exclusive regulation by state or local government, and where the connection of the regulated activity as a whole to interstate commerce is neither readily apparent nor illuminated by express

> congressional findings, the government must satisfy the jurisdictional requirement by pointing to a "substantial" effect on or connection to interstate commerce.

Pappadopoulos, 64 F.3d at 527. It is hard to find a clearer statement of that court's belief that *Lopez* affects the analysis for jurisdictional element statutes. But less than two years later, the same court of appeals found that *Lopez*' "substantially affects" standard was *inapplicable* to federal Hobbs Act convictions, despite that statute's jurisdictional element requirement:

> The district court held that the Supreme Court's decision in [*Lopez*] overruled our well-settled rule that the government need show only a *de minimis* effect on interstate commerce to satisfy the Hobbs Act's jurisdictional element. . . .
>
> We have since held that *Lopez* did not render our use of the *de minimis* standard in Hobbs Act robbery cases constitutionally infirm.

United States v. Woodruff, 122 F.3d 1185, 1185-86 (9th Cir. 1997).

The depth of confusion displayed by these two widely divergent opinions coming out of a single circuit reflects the confusion that can be found throughout the lower courts. Of course, the Petitioner has already cited the depth of the conflict in the circuits on the question of the applicability of *Lopez*' substantial effects standard to jurisdictional element cases. *Compare, e.g., United States v. Rea*, 169 F.3d 1111, 1113 (8th Cir. 1999) ("*Lopez* is inapposite to convictions secured pursuant to section 844(i)"), *and United States v. Tocco*, 135 F.3d 116, 123-24 (2d Cir. 1998) ("We hold that in light of the fact that, unlike the statute in *Lopez*, § 844(i) *does* contain a jurisdictional element, *Lopez* did not elevate the government's burden . . . ."") (emphasis in original), *with United States v.*

Denalli, 73 F.3d 328, *modified on reh'g*, 90 F.3d 444 (11th Cir. 1996) ("*Lopez* required the government to prove that Federles' private residence was used in an activity that had a substantial effect on interstate commerce."). But on closer analysis, it becomes apparent that, even where courts of appeals may agree that *Lopez* raises the government's evidentiary burden to one of "substantial effects," the courts remain mystified as to *how* to apply that standard.

For example, the court below determined that *Lopez* requires even jurisdictional element crimes to meet the "substantial effects" standard. However, it proceeded to find that the "substantial effects" standard could be met by the aggregation of all arsons, and therefore it was immaterial whether the burned property was used primarily for residential or commercial purposes. *Jones*, 178 F.3d at 480-81. And though the Fifth Circuit recently concurred with the Seventh Circuit that all arsons could be aggregated for the purpose of federal jurisdiction, it nevertheless found that the jurisdictional element of the statute could only be met by "explicit" connections to interstate commerce, as opposed to "speculative" or "attenuated" ones. *United States v. Johnson*, 1999 WL 988249, *4 (5th Cir. 1999). And further, even though the Eleventh Circuit in *Denalli* concluded that *the particular arson in question* must substantially affect interstate commerce, *see Denalli*, 90 F.3d at 444, the same circuit appears to have recanted this analysis in *United States v. Viscome*, 144 F.3d 1365 (11th Cir. 1998), when it upheld a federal arson conviction for attempted bombing of a truck under the rationale:

> Because interstate truck leasing is itself a tangible component of interstate commerce, the truck necessarily was used in an activity *that in the aggregate has a substantial effect on interstate commerce*.

Id. at 1369 (emphasis added).

In sum, this Court is confronted by a peculiar set of conflicts within conflicts. The courts of appeals are divided over the fundamental question of whether *Lopez*' substantial effects standard applies to jurisdictional element crimes; further, even in those courts where the substantial effects standard is applied, the courts of appeal are unclear as to what, exactly, must substantially affect interstate commerce. As demonstrated below, if one is to take *Lopez* seriously, the answer to these questions is straightforward: *Lopez*' substantial effects standard must apply to jurisdictional element statutes, and the particular conduct to which the statute is *applied* must also substantially affect interstate commerce.

1. Congress May Regulate Activities That "Substantially Affect" Interstate Commerce, Not Activities That Merely "Affect" Interstate Commerce; Therefore, Any Statute, Whether or Not It Contains a Jurisdictional Element, Must Meet This Constitutional Minimum

In *Lopez*, this Court directly confronted the issue of whether Congress could regulate activities that merely "affect" interstate commerce or whether they must "substantially affect" interstate commerce. *Lopez*, 514 U.S. at 559. This Court resolved the issue in favor of the latter standard; the Constitution allows Congress to regulate only those activities that substantially affect interstate commerce. *Id.* While this Court further held that Congress could meet this requirement through including a jurisdictional element in a statute, *id.* at 561-62, it never intimated that the mere presence of the jurisdictional element would somehow insulate all federal action taken pursuant to such statutes from constitutional challenge. Rather, the presence of a jurisdictional element may save a statute from facial challenge for the very good reason that the jurisdictional element serves to *limit* the statute's applicability. A jurisdictional requirement restricts a statute's "reach to a *discrete set* of [cases] that *additionally* have an explicit

connection with or effect on interstate commerce." *Id.* at 562 (emphases added). Thus, by definition, the federal arson statute *does not* reach all arsons of all property. Instead, it reaches a fixed subset of all arsons; specifically, an arson that affects property used in interstate commerce. *See* 18 U.S.C. § 844(i).

Admittedly, this Court did not expressly state that, where a statute has a jurisdictional element, the conduct being regulated must *substantially affect* interstate commerce, as opposed to merely "*affecting*" interstate commerce, or having "*de minimis*" effects on interstate commerce. But logic dictates that the regulated matter must "substantially affect" interstate commerce if *Lopez* is to mean anything at all. Otherwise, Congress could regulate activities having less than the constitutional minimum by the mere expedient of including jurisdictional elements in their statutes. For example, in *Lopez*, this Court held that Congress lacked the authority to regulate the possession of a gun in a school zone because the mere possession of a gun in a school zone did not "substantially affect" interstate commerce. *Id.* at 567. By the reckoning of some courts of appeals, not only could Congress have saved the statute itself by including a jurisdictional element in that statute (as it did, *see* 18 U.S.C. § 922(q)(2)(A)), but, it could have saved *virtually all applications of the statute*, because under the new statute, the conduct would only have to meet the new "*de minimis*" standard, rather than the "substantially affects" standard. *See, e.g., United States v. Melina*, 101 F.3d 567, 573 (8th Cir. 1996) (Adhering to *de minimis* standard, finding "[b]ecause the statute assailed in *Lopez* did not contain a similar jurisdictional element, and because the *Lopez* Court did not discuss the quantity of evidence necessary to satisfy such an explicit jurisdictional element, *Lopez* by its terms was inapposite."). But this Court could not have understood the "substantially affects" standard as a constitutional minimum if all constitutional infirmities could summarily be swept away with a few pen strokes. As stated above, the purpose of including a

jurisdictional element in a statute is to *limit its reach*, not merely insulate the statute from constitutional challenge.

By refusing to hold jurisdictional element statutes to the "substantially affects" standard in the wake of *Lopez*, the courts of appeals have essentially nullified *Lopez*' holding. That is, in the view of these courts, Congress may not generally regulate the possession of a gun in a school zone because possession of a gun in a school zone does not *substantially affect* interstate commerce. But now that Congress has added a jurisdictional element to that statute, Congress may regulate every possession of a firearm in a school zone if the firearm "has moved in or . . . otherwise affects interstate or foreign commerce" (*see* 18 U.S.C. § 922(q)(2)(A)). The *de minimis* standard has been interpreted by these courts to require so little in the way of interstate commerce impacts that the standard can be met *every time*. *See, e.g., United States v. Lewis*, 100 F.3d 49, 52 (7th Cir. 1996):

> It may be true that Lewis' individual possession of a gun did not have *much* of an impact upon interstate commerce. All we really know here is that the firearm was manufactured in Hungary and was too old to trace further; it may have been years, or even decades, then, since the gun had moved across state lines. . . . A single journey across state lines, however remote from the defendant's possession, is enough to establish the constitutionally minimal tie of a given weapon to interstate commerce, and to bring the defendant's possession of the gun within a framework of regulation whose connection to interstate commerce is more apparent.

As a result, the jurisdictional element does not become a limiting factor at all under the *de minimis* standard. Thus, even though Congress *theoretically* cannot regulate generally the possession of firearms per *Lopez*, it *in fact* may do so if it simply includes

a jurisdictional element in a statute. This is a nonsensical result. If the Constitution dictates that Congress may only regulate matters that substantially affect interstate commerce, Congress--and the courts--cannot negate the constitutional minimum through subterfuge.

If *Lopez* is to retain any meaning whatsoever, it must be understood to require that, where a statute contains a jurisdictional element, the particular activity to which the statute is applied must also "substantially affect" interstate commerce.

2. The Arson in This Case Does Not Meet the Statute's Requirement That the Property Be Used in Commerce or in an Activity That Affects Interstate Commerce

The Court below correctly held that the arson statute must be held to *Lopez*' substantial effects standard. It then applied a "substantial effects" standard to the arson statute by evaluating the effects of arson on interstate commerce. First, it held that arson of residential housing affected interstate commerce because of the existing commerce in building materials, gas and electricity services, insurance, and so on. It further held:

> If instead of asking whether "residential real estate" substantially affects commerce we ask whether "arson of buildings" or even "arson of residences" substantially affects commerce, the answer still must be yes. According to the Federal Bureau of Investigation, there were 69,269 reported arsons in 1997 . . . . Of these arsons, 33,848 involved buildings; and 19,888 of the buildings were residential . . . . The damage was a little more than $14,000 per residential arson. . . . That's a total of approximately $280 million lost to residential arsons in 1997 alone. If even a small fraction of the loss is covered by interstate insurance markets, the effect is "substantial." Most of these arsons also affected gas,

> electric, and telephone service, required the occupants to stay at hotels while repairs were completed (a sure sign of interstate commerce, *see Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 85 S.Ct. 348, 13 L.Ed.2d 258 (1964)), led friends and loved ones to travel from other states to give comfort to the victims, and so on. This collective effect, plus proof of a slight connection between the particular arson and interstate commerce, permits the national government to establish substantive rules of conduct.

Id. at 481 (citations omitted). In short, the Court held that the statute could be applied to this case because arson, in general, substantially affects interstate commerce.

Though the court's generalized conclusions may be rhetorically appealing, its findings ignore the cast of the statute. The court below was plainly in error when it framed the relevant inquiry as: "The statute requires proof that *the arson* with which the defendant is charged have some effect on commerce." *Id.* at 480 (emphasis added). On the contrary, the federal arson statute states, specifically:

> Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property *used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce* shall be imprisoned for not less than 5 years and not more than 20 years . . . .

18 U.S.C. § 844(i) (emphasis added). The statute does *not* regulate *arsons* that affect commerce. By its own terms, the statute regulates the arson of *property* (1) *used* in interstate or foreign commerce; or (2) *used* in any activity affecting interstate or foreign commerce. Given this plain language, the Seventh Circuit's extended colloquy on the economic disruption caused

by the arson of private homes, as a general matter, is mystifying. The statute is entirely indifferent to that issue. The statute requires the commerce inquiry to focus *on the use of the burned property*.

Ironically, the Seventh Circuit unwittingly answered the correct question when it prefaced its flawed analysis with the phrase: "Although living in one's own house is not commerce . . . ." *Jones*, 178 F.3d at 480. This should have been the beginning and the end of the inquiry. The property in question, a residence, was used for "living in," a use that even the Seventh Circuit concedes is "not commerce." Merely *residing* is not a *use* in interstate or foreign commerce, nor is the activity of residing a *use* that, by its nature, substantially affects interstate or foreign commerce.

The proper analysis of commerce impacts under this statute does not look at the effect of the arson on commerce or on other externalities that may somehow connect the burned property to interstate commerce. Instead, the statute itself requires the commerce analysis to focus on *the use to which the burned property is put*. Indeed, in *Denalli*, the Eleventh Circuit specifically emphasized that this was the relevant analysis. *Compare*, *Denalli*, 73 F.3d at 330, *with Denalli*, 90 F.3d at 444 (original opinion stating: "*Lopez* required the government to prove that the *destruction of the Federles' private residence* had a substantial effect on interstate commerce," was modified on rehearing to: "*Lopez* required the government to prove that *Federles' private residence was used in an activity* that had a substantial effect on interstate commerce." (Emphasis added.) *See also United States v. McGuire*, 178 F.3d 203, 211 (3d Cir. 1999) (though the burned vehicle was sporadically used in owner's local catering business, Court held statute could not be applied where the asserted "'*uses* are so trivial or attenuated.'" *Accord*, *Pappadopoulos*, 64 F.3d at 527 ("The residence was *not used at all for commercial activity*. It was purely private."). (Emphasis added.)

The court below never asked, let alone resolved, the relevant question: whether the property in question was *used in* interstate or foreign commerce, or *used in* an activity that affected interstate or foreign commerce. Instead, it analyzed the statute--and the case--as though Congress had attempted simply to federalize the common law crime of arson, and as though the Petitioner challenged the facial validity of the arson statute. Unfortunately, this seems to be an error for which the lower federal courts are regularly culpable--even when their results are, in other respects, correct. *See, e.g., United States v. Johnson*, 1999 WL 988249, at *4 ("the government must show that *the arson* has 'an explicit connection with or effect on interstate commerce.'") (Emphasis added; citation omitted.) Thus, despite the deceptive simplicity of the point made here, it is patently one which requires clarification from this Court. *See also Melina*, 101 F.3d at 572-73 (despite fact that burned property was a restaurant, court did not look at use of property but upheld application of arson statute based on building's receipt of natural gas from out-of-state sources).

In construing the federal arson statute, and indeed any statute containing a jurisdictional element, this Court must look to the statute itself to identify the specific interstate commerce nexus that Congress sought to regulate, and frame its analysis in terms of the statute's explicit commerce requirements.

B. By Its Own Terms, a Statute with a Jurisdictional Element May Not Be Aggregated with Unconnected Cases; the Statute May Only Be Applied Where the Specific Facts of a Case Demonstrate the Requisite Connection to Interstate Commerce

The error of conducting the wrong commerce inquiry is compounded by the fact that courts of appeals are all over the scale when it comes to determining the activity to which the "substantially effects" standard ought to apply. In particular, like the court below, they look not only at the particular matter in question, but at the aggregate effects of *all similar matters*,

regardless of the fact that the actual matters in question may be completely unrelated. *See Jones*, 178 F.3d at 480-81 (aggregating all interstate commerce in building materials and gas and electricity services). Thus, in *United States v. Latouf*, 132 F.3d 320 (6th Cir. 1997), the Sixth Circuit upheld the application of the federal arson statute to the burning of a restaurant with minimal contacts to interstate commerce, stating:

> Although these contacts standing alone may not have been sufficient to demonstrate the requisite "substantial" effect on interstate commerce, this court must consider these contacts in the aggregate.
>
> . . . .
>
> Since *Wickard* still remains the controlling decision, we are bound by the aggregate theory and its attending inferences that *de minimus* interstate economic activity *can be substantial if taken in the aggregate*.

Id. at 327-28 (emphasis added).

The Sixth Circuit's analysis reflects a recent observation by Judge Garwood of the Fifth Circuit: "[E]very individual action no matter how local will ultimately have some at least minute interstate effect, and it will always and inevitably be the case that the aggregation of all such conduct would substantially affect interstate commerce." *Johnson*, 1999 WL 988249, at *8 (Garwood, J., specially concurring).[2] That is, if courts may indiscriminately aggregate activities for the purpose of Commerce Clause analysis, even conduct with *de minimis*

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[2] Judge Garwood suggests that if aggregation may be used at all it may only be used where the aggregated conduct is commercial--that is, where Congress is attempting to reach a "particular class of business or particular national market." *Johnson*, 1999 WL 988249, at *7 (Garwood, J., specially concurring).

effects will always be able to meet the "substantial effects" standard. But this inherent failing of the aggregation principle is particularly acute when aggregation is applied to jurisdictional element statutes, because the aggregation of all *similar* conduct utterly defeats the purpose of having a jurisdictional element in the first place. As the Third Circuit expressed it:

> We do not believe that the Supreme Court required Congress to include a jurisdictional element under *Lopez* only to have courts interpret the resulting statutes in such a way as to remove it.

McGuire, 178 F.3d at 212.

If the effects of all uses of property may be aggregated for the purpose of analyzing "substantial effects," the fundamental requirement that a reviewing court must undertake a "case-by-case inquiry" is nullified. *See Lopez*, 514 U.S. at 561. This cannot be the correct approach. Contrary to the Seventh Circuit's analysis, it is irrelevant if residential housing, as a whole, affects interstate commerce in building materials, electricity, gas, mortgages, insurance, or anything else, because such *generalized* activities do not create the *particularized* link between the use of the property in question and a substantial effect on interstate commerce as the statute requires.[3]

In general, it is not clear there is any proper place for use of the aggregation principle in Commerce Clause analysis, as it may be (and regularly is) employed to sustain any manner of federal legislation by the simple expedient of expanding the scope of activities that are aggregated. *See, e.g., Ace Auto Body & Towing, Ltd. v. City of New York*, 171 F.3d 765, 778

[3] Of course, the Seventh Circuit may believe that arson, in general, substantially affects interstate commerce, and therefore is a proper subject of federal regulation under the Commerce Clause. However, even if the Seventh Circuit believes that Congress may always regulate all arson, the court's analysis is flawed because the statute itself does not purport to regulate all arsons.

(2d Cir. 1999) (all municipal towing laws, in the aggregate, substantially affect interstate commerce); *National Association of Home Builders v. Babbitt*, 130 F.3d 1041, 1053-54 (D.C. Cir. 1997) (extinction of species, in the aggregate, will substantially affect interstate commerce); *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*, 191 F.3d 845, 850 (7th Cir. 1999) (destruction of bird habitat, in the aggregate, substantially affects interstate commerce). In short, as this case demonstrates, the aggregation test is inherently elastic--and, consequently, inherently susceptible to abuse.

The aggregation doctrine is entirely misplaced in the context of statutes containing express jurisdictional elements. By definition, jurisdictional elements are *limiting* provisions. *Lopez*, 514 U.S. at 561-62. With the federal arson statute, Congress did not attempt to regulate all arsons *per se*. Rather, Congress sought to regulate only those arsons that affected interstate commerce in a particular way. This Court should expressly disavow the aggregation principle as a means of validating the application of federal statutes containing jurisdictional elements.

II

FOR JURISDICTIONAL ELEMENT STATUTES, FEDERAL JURISDICTION MAY ONLY REACH CONDUCT WITH DIRECT AND SUBSTANTIAL EFFECTS ON INTERSTATE COMMERCE AND MAY NOT REACH INTRASTATE CONDUCT THAT IS MORE PROPERLY THE SUBJECT OF THE STATE'S GENERAL POLICE POWER

A. This Court Should Hold That, for Jurisdictional Element Statutes, Substantial Effects May Only Be Met by Explicit and Direct Connections to Interstate Commerce

As demonstrated above, jurisdictional statutes require that the regulated conduct must meet *Lopez*' "substantially affects"

interstate commerce standard. Further, a court reviewing a case involving a jurisdictional element statute may not look to outside facts to establish the interstate commerce nexus; rather, the jurisdictional element requirement, by definition, requires a court to look at the specific application of the statute to the facts before it to satisfy itself that the requisite nexus between the regulated conduct and interstate commerce exists. It remains to be seen, however, how close the nexus must be in order to constitute "substantial effects." Several courts of appeals have wrestled with this issue and devised various formulations in an attempt to construe the federal arson statute in a manner that is faithful to this Court's decision in *Lopez*.

In *United States v. McGuire*, the federal government sought to prosecute the defendant under the federal arson statute for placing a pipe bomb in his mother's car. The victim operated a local catering business, in which she occasionally used her car. First, the government argued that it needed only to establish *de minimis* effects on commerce in order to satisfy the jurisdictional element. *McGuire*, 178 F.3d at 208. Accordingly, its argument rested on an astoundingly thin reed:

> The evidence established that a bottle of Tropicana orange juice had been in the trunk of the Toyota when it exploded. The raw material for that orange juice was produced in Florida and then shipped by "tanker" truck to Reading Pennsylvania where it was packaged for home consumption and distributed . . . . Although the government conceded that the catering business itself was a small, intrastate activity, the prosecutor argued that *the bottle of orange juice was sufficient to satisfy the interstate commerce requirement* . . . .

Id. at 206 (emphasis added). On appeal, however, though the Third Circuit did not expressly find that *Lopez*' "substantial effects" standard was mandated, it was skeptical, in light of

Lopez, that *de minimis* effects were sufficient. *Id.* at 210. Accordingly, the government sought to bolster its case by alleging additional interstate commerce impacts, specifically, the additional presence of toothpicks and chicken in the trunk of the bombed car, the presence of fuel in the gas tank, and the car's occasional use in the victim's catering business. *Id.* at 206. The Third Circuit adopted the following standard:

> [W]e consider both the nature and frequency of that use, as well as the extent to which the [use] affected commerce, in deciding if the evidence supports the exercise of federal jurisdiction under *Lopez*.

Id. at 209. Notwithstanding the list of purported interstate commerce connections asserted by the government, the Third Circuit remained unconvinced that the government had met its burden, concluding that the asserted connections were too "trivial" and "attenuated" to confer federal jurisdiction.[4]

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[4] Surprisingly, the government never argued that *the car itself* was used in interstate commerce. While Amicus believes that this, too, is insufficient under the statute, the courts of appeals, including the Third Circuit, *see United States v. Bishop*, 66 F.3d 569 (3d Cir. 1995), have upheld the federal carjacking statute based on the fact that the carjacking statute contains a jurisdictional element applying only to a car "that has been transported, shipped, or received in interstate or foreign commerce," *see* 18 U.S.C. § 2119, and based on the theory that "cars are themselves instrumentalities of commerce, which Congress may protect." *United States v. Oliver*, 60 F.3d 547, 550 (9th Cir. 1995).

If this is all the jurisdictional element requires, the jurisdictional element method of sustaining federal commerce legislation is, at best, a legal fiction and, at worse, a farce. If passive conduct such as mere possession or status suffices to meet "in or affecting interstate commerce" elements, nothing is beyond federal power, because virtually no physical object encountered in modern life is wholly the product of intrastate materials, manufacture, or distribution. (*See, e.g.*, 18 U.S.C.

(continued...)

Similarly, in *Johnson*, the Fifth Circuit was not satisfied that the government had met its burden with respect to the arson of a church annex. *Johnson*, 1999 WL 988249, at *1. In that case, the asserted connections to commerce were: (1) the church collected funds which it (2) distributed to the national church, which in turn (3) distributed them to various other church organizations, and (4) an out-of-state insurer covered the arson claim. *Id.* at *5. The Fifth Circuit found these contacts insufficient, instead holding that the statute required the government to

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[4](...continued)
§ 922(g)(1) criminalizing the possession of firearm ammunition where the mere components (such as powder) once traveled in interstate commerce.)

Accordingly, if the federal commerce power is indeed limited, this Court should consider expressly overruling *Russell v. United States*, 471 U.S. 858, 861 (1985) (holding that rental property is, *per se*, "used in interstate commerce" because "local rental of an apartment unit is merely an element of a much broader commercial market in rental properties"), and *Scarborough v. United States*, 431 U.S. 563, 572 (1977) (holding that felon's possession of a firearm met the "in or affecting commerce" jurisdictional element where defendant had possessed firearm for an extended period of time and, significantly, *prior to* his felony conviction). In particular, as noted in Section I.A.1 above, if *Scarborough* remains the law, this Court's conclusion in *Lopez* that the Gun Free School Zones Act is invalid has been legislatively overruled by the inclusion of a jurisdictional element in that statute, which now requires that the possessed firearm "has moved in or that otherwise affects interstate or foreign commerce." Since it is statistically unlikely that there exists a firearm (or firearm component) that has not moved in interstate commerce, Congress may now regulate every instance of gun possession in a school zone despite this Court's express holding that Congress lacked the constitutional authority to regulate such conduct.

> show that the arson has "an explicit connection with or effect on interstate commerce." . . . A "speculative" or "attenuated" connection, however, will not suffice to demonstrate the nexus with interstate commerce.

Johnson, 1999 WL 988249, at *4 (citation omitted).[5]

In *Pappadopoulos*, the Ninth Circuit looked to the *Lopez* decision to find out if the use of the house burned in that case fell into the category of activities that Congress could traditionally regulate under its commerce power, specifically, the channels and instrumentalities of interstate commerce, or the interstate transportation of goods in interstate commerce. It found the application of the statute to the house burned in that case did not fall into these categories:

> [A] house has a particularly local rather than interstate character. Moreover, a private residence that merely receives natural gas from out-of-state sources is neither an article nor an instrumentality of

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[5] *But see* the Fifth Circuit's opinion in *United States v. Nguyen*, 117 F.3d 796 (5th Cir. 1997). In that case, the court upheld a federal arson conviction where the defendant placed a bomb in a truck. When the bomb exploded, it incidentally damaged part of a nearby apartment building. Relying upon this Court's holding in *Russell v. United States*, the Court held that the apartment "was property being ""used" in an "activity" that affects commerce,' and thus interstate commerce, within the meaning of § 844(i)." *Nguyen*, 117 F. 3d at 798. In dissent, Judge Jones pointed out that the apartment building suffered only minor and incidental damage that did not amount to "substantial effects" as required by *Lopez*: "Broken windows and split eaves do not make a federal case." *Nguyen*, 117 F.3d at 800 (Jones, J., dissenting). Judge Jones suggests that, after *Lopez*, *Russell* disposes of the case only if (1) the damaged property is targeted by the arson, and (2) interstate commerce is actually impaired by the arson. *Id.* at 799-800.

> commerce. The arson of such a structure has only a remote and indirect effect on interstate commerce.

Pappadopoulos, 64 F.3d at 527-28.

Though the analyses employed by these courts of appeals fall short of establishing a definitive test for determining whether an application of a jurisdictional element statute meets the "substantial effects" standard under *Lopez*, these cases are useful in pointing to the factors that go into an appropriate analysis. Specifically, for purposes of meeting a jurisdictional element requirement, "substantial effects" *cannot* be speculative, attenuated, trivial, remote or indirect. Rather, they must be *explicit*, *direct*, and, of course, *substantial*.

In this case, the total of the interstate commerce connections between the use of the property and interstate commerce asserted by the government were: (1) the receipt of natural gas from an interstate source; (2) the holding of the mortgage on the home by an out-of-state lender; and (3) the receipt of an insurance check from an out-of-state insurer. These incidental connections are too trivial and remote to amount to "uses" of the property for an "activity affecting interstate . . . commerce" as required by Section 844(i).

B. In Construing Jurisdictional Element Statutes, This Court Should Adopt a Rule of Construction That Gives Wide Latitude to the States in the Formulation of Civil and Criminal Policy with Respect to Internal Matters, and Sustain Federal Jurisdiction Only Where Federal Commerce Interests Are Manifest

At one extreme, it is relatively clear what types of connections to commerce are so attenuated as to be excluded from coverage under a federal jurisdictional element:

> For example, though the effect is highly attenuated, driving a few blocks to pick up one's children

> (consumption of gasoline refined from foreign oil, and wear and tear on vehicle manufactured in another state or country) or eating dinner in front of one's own television set (consuming food and beverages from outside of state or country, as well as decisions on how to spend hundreds of millions of advertising dollars), have an indirect effect on interstate, and often foreign commerce. Even such a seemingly parochial action as borrowing a cup of sugar from a neighbor can be viewed as part of the stream of commerce that extends to refineries overseas.

McGuire, 178 F.3d at 210 (footnote omitted). At the other extreme would be acts such as the bombing of an international jetliner or a transcontinental freight train. In the middle ground, however, where no bright line exists, this Court should remain cognizant of two considerations: the justification for federal legislation in the area of common law crime and due respect for the role of the states in governing the conduct of citizens under their general police power.

In *Lopez*, this Court was particularly careful to acknowledge the line between appropriate federal and state action and, in particular, balked at construing the federal commerce power to extend into matters that had *minimal effects* on interstate commerce, but *maximum potential* to interfere in state law matters. Though this Court did not attempt to erect inviolable boundaries between federal and state responsibilities, the *Lopez* decision was premised upon the basic principle that federal power is limited in the area of crime, while state police powers were plenary. *Lopez*, 514 U.S. at 553. Underlying this principle was a further consideration for the principle of federalism:

> To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional

> authority under the Commerce Clause to *a general police power of the sort retained by the States.*

Id. at 567 (emphasis added).

While Congress may federalize some crimes, states "'"possess [the] primary authority for defining and enforcing criminal law,"'" *id.* at 561 n.3 (citation omitted), and criminal law is an area "where States historically have been sovereign," *id.* at 564. This division of responsibilities, though not absolute, is not merely based on the idea that common law crimes, such as arson, are inherently local (or even personal, in the sense that the effects are often not felt beyond the individual victim); more critically under our constitutional system, the division is fundamental to retaining a federal-state balance. That is, if the federal government may reach through its commerce powers all conduct that the states may reach through their police powers, the federal government would possess the ability to override and displace state criminal law schemes entirely. This is intolerable under our federal system. As this Court observed in *Lopez*:

> ("... Under our federal system the administration of criminal justice rests with the States except as Congress, acting within the scope of those delegated powers, has created offenses against the United States"). When Congress criminalizes conduct already denounced as criminal by the States, it effects a "'change in the sensitive relation between federal and state criminal jurisdiction.'" ... [The Gun Free School Zones Act] "displace[s] state policy choices in ... that its prohibitions apply even in States that have chosen not to outlaw the conduct in question."

Lopez, 514 U.S. at 561 n.3. Thus, when the federal government criminalizes arson, the issue is not a "neutral" one--that is, even though arson is unlawful under either scheme, it is not just a question of who will prosecute. Instead, the question is: Under

our federal scheme, which sovereign should govern this conduct?

Like the gun possession statute at issue in *Lopez*, arson is not a crime that begs for a federal solution; arson, as a crime, has roots in the common law and is unlawful in every state. So while Congress may reach arson under certain circumstances, concern for the potential for the abuse of federal power through overreaching into state affairs should militate in favor of a skeptical view of federal interference in the arena of criminal law. In particular, federal prosecution is *not* justified where it simply displaces, wholesale, state criminal law and state criminal law enforcement with no manifest federal purpose. As one court expressed it in a pre-*Lopez* decision:

> Indeed, apparently irresistible political pressures to be perceived as "tough on crime" are driving Congress to federalize crimes such as that here charged, in circumstances where clear-minded, objective analysis can discern *no meaningful effect on interstate commerce in the sense intended by the Commerce Clause.*

United States v. Ornelas, 841 F. Supp. 1087, 1093 (D. Colo. 1994) (emphasis added).

Where the interstate commerce impacts are so significant that a particular act can be understood to be a proper subject of federal authority, federal prosecution is justified. But where a federal statute serves merely to displace state action and state policy, federal courts--and federal prosecutors--should be constrained. In other words, rather than deferring to federal power as a general policy, in the area of criminal law, this Court ought to adopt a policy of deference in favor of protecting *state* authority. Accordingly, for example, the Ninth Circuit in *Pappadopoulos* did not concern itself so much with the uncontroversial point that arson should be unlawful; it simply concluded: "This is a simple state arson crime. It should have

been tried in state court." *Pappadopoulos*, 64 F.3d at 528. Marginal and dubious federal justifications may not trump state plenary authority.

Jurisdictional element statutes should be interpreted in light of the basic understanding that Congress is intentionally and explicitly intruding into areas of law reserved to the states--indeed, if federal authority were unquestioned, a jurisdictional element would be superfluous. Consequently, a jurisdictional element statute such as the arson statute at issue here should be construed to reach only those arsons where the use of the property is so inextricably connected to interstate commerce that the arson could legitimately be said to impair or impede interstate commerce. Such an interpretation would give due consideration to the role of the states under our federal system at the same time that it would give Congress the power, appropriately, to prescribe the laws that govern suitably *federal* interests--specifically, the protection of interstate commerce.

As stated above, jurisdictional element statutes are, by their nature, of limited application, and those limits ought to be defined by a line that respects the responsibility of the state to govern its own affairs. As observed by the Second Circuit in turning back a federal prosecution under the Hobbs Act,

> [i]t is the sensitive duty of federal courts to review carefully the enforcement of our federal criminal statutes to prevent their injection into unintended areas of state governance . . . . Exercising that duty, we find it necessary to nullify this attempted application of the Hobbs Act to circumstances it was never meant to reach. Incremental extensions of federal criminal jurisdiction arguably present a more pernicious hazard for our federal system than would a bold accretion to the body of federal crimes. At a minimum, a clear extension of federal responsibility is likely to be sufficiently visible to provoke inquiries

> and debate about the propriety and desirability of changing the state-federal balance. Less abrupt, more subtle expansions, however, such as nearly occurred here, are less likely to trigger public debate, and, yet, over time cumulatively may amount to substantial intrusions by federal officials into areas properly left to state enforcement. By holding that the Hobbs Act does not encompass state-law commercial bribery, we seek to demarcate a point beyond which congress intended federal prosecutors not to pass.

United States v. Capo, 817 F.2d 947, 955 (2d Cir. 1987). The line between federal and state jurisdiction may not be bright, but it must exist and it must be conscientiously observed if federalism, and the liberties conferred upon the citizenry by federalism, is to remain viable and, more, robust.

CONCLUSION

In *Gregory v. Ashcroft*, 501 U.S. 452, 459 (1991), this Court stated: "In the tension between federal and state power lies the promise of liberty." in construing the Commerce Clause, this Court should remain faithful to the promise of liberty embodied in the Constitution--a promise *Lopez* reaffirmed. Accordingly, the commerce power must be understood as limited by the context of the overall constitutional scheme that sought to divide government power between the federal government and the states by delegating authority over certain specified objects to the federal government, and leaving a residual power in the states to regulate their own affairs.

By construing the federal arson statute to reach conduct bearing no special basis for warranting the extraordinary exercise of federal commerce jurisdiction into a matter of state criminal law, the court below construed federal power in a manner fundamentally inconsistent with the federal scheme of the Constitution.

Accordingly, amicus respectfully submits that the decision of the court below should be REVERSED.

DATED: December, 1999.

Respectfully submitted,

ANNE M. HAYES
Counsel of Record
M. REED HOPPER
Pacific Legal Foundation
10360 Old Placerville Road,
Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932

Counsel for Amicus Curiae
Pacific Legal Foundation

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IN THE
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DEWEY JONES

Petitioner,

v.

UNITED STATES

Respondent.

On Writ of Certiorari to the
Seventh Circuit Court of Appeals

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONER

MICHAEL P. FARRIS*
SCOTT W. SOMERVILLE
Center for the Original Intent of the Constitution, at
Patrick Henry College
P.O. Box 1776
Purcellville, VA 20134
(540) 388-1776
* *Counsel of Record*

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QUESTION PRESENTED

Dewey Jones was convicted of the federal crime of burning down a building that was "in" or "affected" interstate commerce. The building Jones burned was his cousin's private residence.

In light of *United States v. Lopez*, 514 U.S. 549 (1995), and the interpretive rule that constitutionally doubtful constructions should be avoided, does 18 U.S.C. § 844(i) apply to arson of this private residence, and if so, is its application to the private residence in this case constitutional?

TABLE OF CONTENTS

Question Presented ii

Table of Contents iii

Table of Authorities v

Interest of the *Amicus* 1

Summary of Argument 3

Argument 5

I. Our Founders Only Intended to Give Congress Power to Do What the States Were Separately Incompetent to Do 5

A. The Constitutional Convention Spelled Out the Scope of All Legislative Power 5

B. The States Are "Separately Competent" to Protect Private Property 7

C. Commerce and Separate Incompetence 9

D. The Limits of Commerce Power 14

II. This Conviction Must Be Overturned Because Federal Prosecution of Common Crimes Threatens Our System of Dual Sovereignty 16

A. Structural Guarantees of Freedom 16

B. The Challenge of Dual Sovereignty 18

C. Freedom Through Federalism 21

Conclusion 22

TABLE OF AUTHORITIES

Cases

Clinton v. New York,
524 U.S. 417 (1998) 17

Gibbons v. Ogden,
22 U.S. 1 (1824) ..... passim

Lochner v. New York,
198 U.S. 45 (1905) 22

Printz v. United States,
521 U.S. 898 (1997) 17

Russell v. United States,
471 U.S. 858 (1985) 3

United States v. Lopez,
514 U.S. 549 (1995) ii

United States v. Morrison,
Nos. 99-5 and 99-29 (S. Ct., oral arguments
scheduled for Jan. 11, 2000) 1

Statutes

18 U.S.C. 844(i) ..... ii, 3

Organized Crime Control Act of 1970,
84 Stat. 922 ..... 3, 19

Constitutional Provisions

U.S. Const. Amend. X 6

U.S. Const. Amend. XIV 21

U.S. Const. Art. I, § 10, cl. 1 21

U.S. Const. Art. I, § 8 ..... 6, 7, 9

U.S. Const. Art. IV, § 4 21

U.S. Const. Preamble 2

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The Federalist No. 51 (J. Madison) (J. Hamilton ed.
1869) 18

INTEREST OF THE *AMICUS*[1]

The Center for the Original Intent of the Constitution was formed by the Home School Legal Defense Association in 1998, and now operates under the auspices of Patrick Henry College. The Center holds that the interpretation of the Constitution according to the original intent of the founders is the only safe basis for the preservation of limited government and all rights including those important to our association. The Center exists to systematically research and advocate constitutional interpretation according to the principle of original intent.

In our briefs to date, we have argued that principles of *dual sovereignty*, implicit in the structure of the Constitution, limit the powers of Congress over States. In our brief in *United States v. Morrison*, Nos. 99-5 and 99-29 (S. Ct., oral arguments scheduled for Jan. 11, 2000), we explained how the Founders' notion of "separate incompetence" limits the power of Congress over private intrastate activity. In this brief, we bring together the complementary strands of "dual sovereignty" and "separate incompetence" in an effort to return to the *strong* yet *limited* federal government our Founders established.

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[1] Pursuant to Rule 37.6, this brief was authored, prepared, and paid for in its entirety by the Center for the Original Intent of the Constitution at Patrick Henry College and the Home School Legal Defense Association. No counsel for a party authored any part of this brief, nor did any person or entity other than *amicus curiae*, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

The amicus curiae requested and received the written consents of the parties to the filing of this brief. Such written consents, in the form of letters from counsel of record for the parties, have been submitted for filing to the Clerk of Court. See Sup. Ct. Rule No. 37.3(a).

Our Founders established a federal government with limited and enumerated powers. The limits on federal power were originally intended to protect the autonomy of the States and the liberties of the people. The Founders viewed vigorous State governments and limited federal government as essential to personal liberty. So do we.

Our interest is to preserve the blessings of liberty for ourselves and our posterity. U.S. Const. Preamble. We seek to do this by holding the federal government to the terms of our original social contract: the Constitution. Faithful adherence to the original intent of the Founders is essential; not because they are ancient and deserve veneration, but because they were the elected representatives of the people.

Self-government demands that the intention of the elected Framers should always prevail over the views of unelected judges guided by floating notions of a "living Constitution." Our Founders made promises to the people that ratified the Constitution. Those promises are what are ultimately at stake in this case.

SUMMARY OF ARGUMENT

Dewey Jones was convicted of throwing a Molotov cocktail into his cousin's living room. This is non-commercial activity that our Founders expected the States to punish. Yet he was convicted of violating a federal statute that makes it a crime to burn down a building that is "in" or "affecting" interstate commerce. 18 U.S.C. 844(i).

The Commerce Clause has been a slippery slope since the New Deal, but this statute is extraordinary. The legislative history of the Organized Crime Control Act of 1970 indicates that Congress intended to push its power all the way out to the farthest fringes. *See, e.g., Russell v. United States*, 471 U.S. 858, 860-62 (1985) (§ 844(i) was intended to have the "fullest jurisdictional breadth constitutionally permissible under the Commerce Clause"). In the initial draft of this legislation, federal jurisdiction was limited to buildings used for business purposes, but the Committee changed that in order to reach as far as they could. *Russell*, 471 U.S. at 862. They did not determine that they had constitutional authority to do so. They just made up their minds to go as far as the Constitution allows.

Congress wanted the Department of Justice to have the broadest possible power to combat organized crime, but the executive branch has used that power to prosecute common criminals like Dewey Jones. If the commerce power is a slippery slope, then the legislative and executive branches of the federal government are a bobsled team. This Court must decide whether to pile on or to apply the brakes.

Overly broad legislation and indiscriminate prosecution have combined to place this case before this Court. If neither of the other federal branches have any sense of restraint, this Court must restrain them. The choices before the Court are few. It can abandon any meaningful notion of limited government by upholding this conviction. It can strike down the federal arson act—and many other federal criminal statutes with a jurisdictional component—as unconstitutionally vague. Or it can establish some test to decide which buildings "affect" interstate commerce and which do not, and decide this case accordingly.

We urge this Court to spell out a judicially manageable standard that is true to the text and purpose of Article I. That is a difficult task, yet we believe that such a standard exists. A "separate incompetence" standard can be found in the journals of the Constitutional Convention. We urge this Court to adopt this standard, apply it, and reverse this conviction.

Separate incompetence is the logic that dictated the language of the Constitution. Our entire system of dual sovereignty assumes that Congress and the States have distinct spheres of operation, and that those spheres seldom intersect. The very structure of our federalism presupposes that there is a boundary between the separated powers. The "separate incompetence" standard makes it easier to determine what those boundaries really are.

This Court's interpretation of "interstate commerce," since the New Deal, eliminates any real boundary between State and federal jurisdiction. That is wrong. When Chief Justice Marshall decided *Gibbons v. Ogden*, 22 U.S. 1 (1824), he articulated a clear distinction between State and federal power over commerce. He said:

> The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government.

Gibbons, 22 U.S. 1, 195, 6 L.Ed. 23, 70 (1824).

Dewey Jones firebombed his cousin's living room. We think that was evil: but it does not affect the States generally, nor does it affect any other State, nor is it necessary to interfere with Indiana's criminal justice system in order to execute the general powers of the federal government. Under the separate incompetence standard articulated by Chief Justice Marshall in *Gibbons*, this conviction should be reversed.

ARGUMENT

I.

OUR FOUNDERS ONLY INTENDED TO GIVE CONGRESS POWER TO DO WHAT THE STATES WERE SEPARATELY INCOMPETENT TO DO

A. THE CONSTITUTIONAL CONVENTION SPELLED OUT THE SCOPE OF ALL LEGISLATIVE POWER

The Framers of our Constitution did not intend to intrude upon the authority of the States, not did they intend to pit two sovereigns against each other in every field of human

endeavor. They intended to *split* the atom of sovereignty. They wanted Congress to do what the States could not do on their own, and they wanted Congress to *not* do what the States *could* do. The proof of this can be found in the records of the Constitutional Convention.

Before our Founders ever enumerated the powers in Article I, § 8, they first agreed upon the proper scope of federal legislative power. They wanted Congress to be able to legislate wherever the States were *separately incompetent* to do so. They therefore resolved to give Congress power:

> [T]o legislate in all cases for the general interests of the Union, and also in those to which the States are severally incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation.

1 Madison, James, Journal of the Federal Convention 362 (2d ed. 1893) [hereinafter "Madison's Journal"].

Once they had agreed to this "separately incompetent" standard, our Founders had little difficulty choosing between the infinite number of possible powers of Congress. They knew what they wanted: Congress should be able to do what the States, separately, cannot; and Congress should *not* be able to do what the States, separately, can do. They reduced the principle to a list of enumerated powers, and later closed off that list with the Tenth Amendment.

B. THE STATES ARE "SEPARATELY COMPETENT" TO PROTECT PRIVATE PROPERTY

If Congress had not asserted virtually infinite power in this and similar criminal statutes with a jurisdictional element, and if the Executive branch had not used that power to prosecute ordinary intrastate crimes, we might not need to dust off the "separate incompetence" standard. After all, the enumerated powers in Article I, § 8 were intended to spell out what Congress can and cannot do without reference to the underlying reasoning of the Framers. But the other two branches of the federal government seem to have abandoned any notion of enumerated powers, and this Court must reassert some constitutional limits. In this section, we suggest how to do that.

The "separate incompetence" standard sets reasonable limits on *all* the Article I powers in light of the historically verifiable purposes of our Founders. Federal courts would do well to consider each clause of the original resolution defining legislative power within the Constitutional Convention, which gave Congress power to legislate in cases:

1. where the States are severally incompetent;

2. where the harmony of the United States may be interrupted by individual State legislation; and

3. in all cases for the general interests of the Union.

Federal legislation is appropriate in the first sense when the States cannot accomplish the goal individually. This is the purest sense of "separate incompetence." If individual States cannot do the job, our Founders wanted Congress to have the power they lacked. If the States were simply unable

to punish arson, federal arson legislation might be necessary. The States *are* able to punish arson, however, so this statute is not appropriate in this sense.

Federal legislation is also appropriate when the "harmony of the United States" would be "interrupted by the exercise of individual legislation." This is the case where individual States can deal with the problem, but their multiple solutions would create a whole new set of problems. (Preemption law deals with this situation.) If Dewey Jones had burned down an airport or other building in a field completely preempted by federal legislation, federal arson prosecution would have been appropriate. But he did not.

Finally, legislation may be appropriate if it advances the "general interests of the Union." This third strand of "separate incompetence" deserves close scrutiny. It was initially proposed by Gunning Bedford, Jr., of Delaware, midway through the Constitutional Convention. Edmund Randolph, Governor of Virginia and chief sponsor of the original "separate incompetence" language, was troubled by Bedford's proposal.

> Mr. RANDOLPH. This is a formidable idea, indeed. It involves the power of violating all the laws and Constitutions of the States, and of intermeddling with their police. The last member of the sentence [regarding interrupted harmony] is also superfluous, being included in the first [regarding general interests].
>
> Mr. BEDFORD. It is not more extensive or formidable than the clause as it stands: no State being separately competent to legislate for the general interest of the Union.

1 Madison's Journal, *supra*, 362.

Bedford's language carried, over Randolph's objections, and it was this modified vision of legislative power that the Committee of the Whole referred to a Committee of Detail, on July 26th. 1 Elliot, Jonathan, Debates on the Federal Convention 221 (2d ed. 1863). Randolph was on that Committee, which promptly converted that broad resolution into the specific list of enumerated powers found in Article I, § 8.

Bedford never objected to the replacement of his wording with a specific list of enumerated powers, presumably because the list accomplished all that Bedford had intended. Neither Bedford nor any other Founder intended the Commerce Clause to become a "sweeping clause" that could abolish all the barriers of federalism. Bedford's signature on the finished Constitution indicates his satisfaction with the enumerated powers. They covered everything Bedford thought that the States were not "separately competent" to do.

Since the New Deal, Congress has repeatedly done just what Randolph feared it might do. As we shall show in our second argument, that is a real problem. A general federal arson statute upsets the balance of State and federal power, and reduces, rather than enhances freedom of property. If the "general interests of the Union" means whatever a majority of Congress thinks it means, then we have an unlimited, rather than a limited, federal government. But this Court, early on, spelled out a clearer and better definition of the "general interests of the Union."

C. Commerce and Separate Incompetence

The first great case on Commerce was *Gibbons v. Ogden*, 22 U.S. 1, 6 L.Ed. 23 (1824), where this Court struck down a

New York law granting a monopoly over steamship travel to Robert R. Livingston and the inventor of the steamboat, Robert Fulton. Chief Justice Marshall ruled that Congress did not just have power to regulate commerce between the States: it had *exclusive* power to do so.

The winning attorney in *Gibbons* was Daniel Webster, who explained the state of navigation in the waters surrounding New York City in 1824:

> By the law of New-York, no one can navigate the bay of New-York, the North River, the Sound, the lakes, or any of the waters of that State, by steam vessels, without a license from the grantees of New-York, under penalty of forfeiture of the vessel.
>
> By the law of the neighbouring State of Connecticut, no one can enter her waters with a steam vessel having such license.
>
> By the law of New-Jersey, if any citizen of that State shall be restrained, under the New-York law, from using steam boats between the ancient shores of New-Jersey and New-York, he shall be entitled to an action for damages, in New-Jersey, with treble costs against the party who thus restrains or impedes him under the law of New-York! This act of New-Jersey is called an act of retortion against the illegal and oppressive legislation of New-York; and seems to be defended on those grounds of public law which justify reprisals between independent States.

> It would hardly be contended, that all these acts were consistent with the laws and constitution of the United States. If there were no power in the general government, to control this extreme belligerent legislation of the States, the powers of the government were essentially deficient, in a most important and interesting particular…

Gibbons, 6 L.Ed., at 24 (Daniel Webster, for the Plaintiff).

Webster knew how broadly the term "commerce" could be construed, but he interpreted the word in light of the obvious intentions of the Founders. Webster said:

> It was in vain to look for a precise and exact definition of the powers of Congress, on several subjects. The constitution did not undertake the task of making such exact definitions. In conferring powers, it proceeded in the way of enumeration, stating the powers conferred, one after another, in few words; and, where the power was general, or complex in its nature, the extent of the grant must necessarily be judged of, and limited, by its object, and by the nature of the power.
>
> Few things were better known, than the immediate causes which led to the adoption of the present constitution; and he thought nothing clearer, than that the prevailing motive was to regulate commerce; to rescue it from the embarrassing and destructive consequences, resulting from the legislation of so many different States, and to place it under the protection of a uniform law. The great

objects were commerce and revenue; and they were objects indissolubly connected. By the confederation, divers restrictions had been imposed on the States; but these had not been found sufficient. No State, it was true, could send or receive an embassy; nor make any treaty; nor enter into any compact with another State, or with a foreign power; nor lay duties, interfering with treaties which had been entered into by Congress. But all these were found to be far short of what the actual condition of the country required. The States could still, each for itself, regulate commerce, and the consequence was, a perpetual jarring and hostility of commercial regulation.

In the history of the times, it was accordingly found, that the great topic, urged on all occasions, as showing the necessity of a new and different government, was the state of trade and commerce. To benefit and improve these, was a great object in itself: and it became greater when it was regarded as the only means of enabling the country to pay the public debt, and to do justice to those who had most effectually laboured for its independence. The leading state papers of the time are full of this topic. The New-Jersey resolutions complain, that the regulation of trade was in the power of the several States, within their separate jurisdiction, in such a degree as to involve many difficulties and embarrassments; and they express an earnest opinion, that the sole and exclusive power of regulating trade with foreign States, ought to be in Congress. Mr. Witherspoon's motion in Con-

gress, in 1781, is of the same general character; and the report of a committee of that body, in 1785, is still more emphatic. It declares that Congress ought to possess the sole and exclusive power of regulating trade, as well with foreign nations, as between the States. The resolutions of Virginia, in January, 1786, which were the immediate cause of the convention, put forth this same great object. Indeed, it is the only object stated in those resolutions. There is not another idea in the whole document. The entire purpose for which the delegates assembled at Annapolis, was to devise means for the uniform regulation of trade. They found no means, but in a general government; and they recommended a convention to accomplish that purpose. Over whatever other interests of the country this government may diffuse its benefits, and its blessings, it will always be true, as matter of historical fact, that it had its immediate origin in the necessities of commerce; and, for its immediate object, the relief of those necessities, by removing their causes, and by establishing a uniform and steady system. It would be easy to show, by reference to the discussions in the several State conventions, the prevalence of the same general topics; and if any one would look to the proceedings of several of the States, especially to those of Massachusetts and New-York, he would see, very plainly, by the recorded lists of votes, that wherever this commercial necessity was most strongly felt, there the proposed new constitution had most friends. In the New-York convention, the argument arising

> from this consideration was strongly pressed, by the distinguished person [Robert R. Livingston] whose name is connected with the present question [Livingston was half owner of the steamboat monopoly].

Gibbons, 6 L.Ed. at 25-26 (Daniel Webster, for the Plaintiff).

D. THE LIMITS OF COMMERCE POWER

Webster brought his argument back to the fundamental principles of federalism. He did not argue for an expansion of federal power at State expense. He called, instead, for a structural balance between State and federal governments that we label "separate incompetence" and that this Court has since upheld under the heading of "dual sovereignty." Webster argued:

> It is the true wisdom of these governments to keep their action as distinct as possible. The general government should not seek to operate where the States can operate with more advantage to the community; nor should the States encroach on ground, which the public good, as well as the constitution, refers to the exclusive control of Congress.

Gibbons, 6 L.Ed. at 15 (Daniel Webster, for the Plaintiff).

Webster won his case. Chief Justice John Marshall struck down the New York monopoly, ruling that Congress's power to regulate interstate commerce was an *exclusive* power.

Marshall refused to construe the term "commerce" so narrowly as to exclude steamboat travel. We believe Marshall was right. Today, however, Congress construes "commerce" so broadly that it includes arson. Did Chief Justice Marshall step onto a slippery slope, which led inevitably to this result? Or did he envision limits to the powers he enlarged?

Marshall did not just envision limits, he stated them. Marshall's words in *Gibbons* provide the soundest available test for the true scope of congressional power. He wrote:

> The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. The completely internal commerce of a State, then, may be considered as reserved for the State itself.

Gibbons, 22 U.S. at 195, 6 L.Ed. at 70.

Gibbons is a perfect application of "separate incompetence" to a specific question about commerce. In a single case, it aptly expresses the "genius and character of the whole government." Marshall, here, put into words what Gunning Bedford, Jr., meant when he said "[N]o state [is] separately competent to legislate for the general interest of the Union." 1 Madison's Journal, *supra*, 362, and he has done so in a way that would satisfy Edmund Randolph.

Marshall offers a judicially manageable test that is true to the text and purpose of the Constitution. If this Court applies it here, this conviction will be reversed. Dewey Jones' act of

arson was an internal concern to the State of Indiana. It did not affect the States generally, nor did it affect another State. The federal government, in executing its general powers, had no need to interfere with Indiana's own criminal justice system in this case. On the contrary: the protection of private property within Indiana by Indiana's own criminal justice system is a matter properly reserved to Indiana itself.

ARGUMENT

II.

THIS CONVICTION MUST BE OVERTURNED BECAUSE FEDERAL PROSECUTION OF COMMON CRIMES THREATENS OUR SYSTEM OF DUAL SOVEREIGNTY

Vigorous State government cannot survive federal usurpation of its core functions. If the States were merely quaint reminders of our colonial heritage, the conviction of Dewey Jones might be upheld, but they are not. The States are a vital part of the structure of American liberty, and federalization of crimes against property threatens an essential freedom. This Court must reverse this conviction.

A. STRUCTURAL GUARANTEES OF FREEDOM

We the people wrote and ratified our own Constitution in order to form a more perfect union; and the purpose of that union was to secure the blessings of liberty to ourselves and our posterity. U.S. Const. Preamble. Autonomous States are an essential component of that liberty, as this Court has repeatedly insisted:

> In recent years, perhaps, we have come to think of liberty as defined by that word in the Fifth and Fourteenth Amendments and as illuminated by the other provisions of the Bill of Rights. The conception of liberty embraced by the Framers was not so confined. They used the principles of separation of powers and federalism to secure liberty in the fundamental political sense of the term, quite in addition to the idea of freedom from intrusive governmental acts.

Clinton v. New York, 524 U.S. 417, 451 (1998) (Kennedy, J., *concurring*).

> This separation of the two spheres is one of the Constitution's structural protections of liberty. Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.

Printz v. United States, 521 U.S. 898, 921 (1997).

Or, to quote Madison:

> In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.

The Federalist No. 51, at 323 (J. Madison) (J. Hamilton ed. 1869).

B. THE CHALLENGE OF DUAL SOVEREIGNTY

This Court has used the term "dual sovereignty" to describe the relationship between State and federal governments. Each citizen is subject to two governments, but neither of those governments is subject to the other. Instead, ideally, each government operates in its own well-defined field with a minimum of overlap or interference.

The problem with dual sovereignty is that it has a potential for conflict—or even tyranny. The Founders knew they were *reducing* State autonomy when they gave Congress the power to govern citizens directly, without relying on the intermediary of State governments. Alexander Hamilton begins Federalist No. 17 by confronting this problem:

> AN OBJECTION of a nature different from that which has been stated and answered in my last address may perhaps be likewise urged against the principle of legislation for the individual citizens of America. It may be said that it would tend to render the government of the Union too powerful, and to enable it to absorb those residuary authorities, which it might be judged proper to leave with the States for local purposes.

The Federalist No. 17, at 156 (A. Hamilton) (J. Hamilton ed. 1869).

This *amicus* believes that the federal government has, in fact, become so powerful as to "absorb" the authority of the State and local governments. At the time, however, Hamilton found this fear far-fetched. He wrote:

> Allowing the utmost latitude to the love of power which any reasonable man can require, I confess I am at a loss to discover what temptation the persons intrusted with the administration of the general government could ever feel to divest the States of the authorities of that description. The regulation of the mere domestic police of a State appears to me to hold out slender allurements to ambition.... The administration of private justice between the citizens of the same State, the supervision of agriculture and of other concerns of a similar nature, all those things, in short, which are proper to be provided for by local legislation, can never be desirable cares of a general jurisdiction. It is therefore improbable that there should exist a disposition in the federal councils to usurp the powers with which they are connected; because the attempt to exercise those powers would be as troublesome as it would be nugatory; and the possession of them, for that reason, would contribute nothing to the dignity, to the importance, or to the splendor of the national government.

The Federalist No. 17, at 156.

Hamilton did not foresee the Organized Crime Control Act of 1970, 84 Stat. 922. Although he believed Congress would never really want to intrude upon domestic police powers, he was willing to assume, for the sake of the argument, that it might happen. He wrote:

> But let it be admitted, for argument's sake, that mere wantonness and lust of domination would be sufficient to beget that disposition;

still it may be safely affirmed that the sense of the constituent body of the national representatives, or, in other words, the people of the several States, would control the indulgence of so extravagant an appetite. It will always be far more easy for the State governments to encroach upon the national authorities than for the national government to encroach upon the State authorities. The proof of this proposition turns upon the greater degree of influence which the State governments, if they administer their affairs with uprightness and prudence, will generally possess over the people....

> There is *one transcendent advantage* belonging to the province of the State governments, which alone suffices to place the matter in a clear and satisfactory light—I mean the ordinary administration of criminal and civil justice. This, of all others, is the most powerful, most universal, and most attractive source of popular obedience and attachment. It is this which, being the immediate and visible guardian of life and property, having its benefits and its terrors in constant activity before the public eye, regulating all those personal interests and familiar concerns to which the sensibility of individuals is more immediately awake, contributes more than any other circumstance to impressing upon the minds of the people *affection, esteem, and reverence* towards the government.

The Federalist No. 17, at 156-57 [*emphasis supplied*].

Convicting Dewey Jones of a federal crime undermines the people's loyalty to the government of their own States. See U.S. Const. Art. IV, § 4. Federal prosecution of a garden-variety crime like this one deprives the States of their "one transcendent advantage." It lessens the "affection, esteem, and reverence" that citizens should feel for a competent State government. If the States matter at all, then this case matters.

C. FREEDOM THROUGH FEDERALISM

The States do matter. They matter in too many ways to enumerate here, but since this is an arson case, and arson is a crime against property, we will simply show how State autonomy enhances property rights.

Each State protects, regulates, and taxes property in its own way. Americans are free to choose between fifty different "package deals." If their State inadequately protects property, or burdens it with too much regulation, or eats it up through excessive taxation, citizens can try to change the laws—or they can change States by picking up and moving.

The "separate incompetence" standard enhances property rights. If a State is actually unable to protect property, reasonable property owners in that State would want federal protection. But if the States can do the job on their own, property owners would rather retain their freedom of choice. The theoretical maximum protection of property rights would occur in a system where the federal government protected *only* those rights that demand nationwide protection (as bankruptcy, patent, and copyright laws do), and left all other property rights to a wide variety of State laws. (The State laws might need to be constrained by some additional protections, like the Contracts Clause and the Fourteenth Amendment.)

We do not suggest that this Court should return to the discredited practice of striking down Acts of Congress on the basis of economic theory. *See, e.g., Lochner v. New York*, 198 U.S. 45 (1905). We think, instead, that the Court should interpret the text of the Constitution so as to fulfill the purposes of those who wrote it, especially when economic theory confirms the true genius of that original intent.

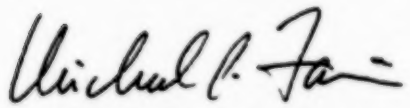
The conviction of Dewey Jones takes away the freedom of property that dual sovereignty provides. It perverts the text of the Constitution and frustrates the purposes of those who chose that text. This conviction should therefore be reversed.

CONCLUSION

Our Founders split the atom of sovereignty, creating a whole new kind of government that divided power in order to serve the people. If we hope to be true to our Founders' vision, this conviction must be reversed. Dewey Jones should be in jail, but he should be in an Indiana jail for breaking Indiana law, not in a federal prison for the legal fiction of an assault on "interstate commerce."

Our Founders intended Congress to act where the States were separately incompetent to do so, and to refrain from acting otherwise. In this case, Congress refused to refrain, and the Department of Justice has only made things worse. If Article I power is to be limited at all, therefore, this Court must limit it. Ideally, that limit should be true to the text and purpose of the Constitution, and should be something that judges can reasonably apply. Chief Justice Marshall spelled out exactly such a standard in *Gibbons*. This Court should apply that standard in this case and reverse this conviction.

Respectfully Submitted,



MICHAEL P. FARRIS*
SCOTT W. SOMERVILLE
Center for the Original Intent of
the Constitution, at
Patrick Henry College
P.O. Box 1776
Purcellville, VA 20134
(540) 338-1776

* *Counsel of Record*

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DEWEY J. JONES,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF AMICUS CURIAE FOR DALE LYNN RYAN IN SUPPORT OF PETITIONER

JOHN G. ROBERTS, JR.*
GREGORY G. GARRE
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5810
Counsel for Amicus Curiae

* Counsel of Record

WILSON-EPES PRINTING CO., INC. - (202) 789-0096 - WASHINGTON, D.C. 20001

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	3
ARGUMENT	
I. BY ITS TERMS, SECTION 844(i) ONLY APPLIES TO THE ARSON OF BUILDINGS "USED" IN AN "ACTIVITY" AFFECTING INTERSTATE COMMERCE, AND THUS ORDINARILY DOES NOT EXTEND TO PRIVATE HOMES	4
II. ANY DOUBT ABOUT THE REACH OF SECTION 844(i) TO THE ARSON OF BUILDINGS, SUCH AS THE ONE IN THIS CASE, WITH ONLY ATTENUATED TIES TO INTERSTATE COMMERCE SHOULD BE AVOIDED BY CONSTRUING THE STATUTE IN LIGHT OF *UNITED STATES* v. *LOPEZ*.	10
III. NEITHER SECTION 844(i) NOR THE CONSTITUTION COUNSELS IN FAVOR OF ADOPTING A LIMITING PRINCIPLE BASED SOLELY ON WHETHER OR NOT A BUILDING MAY BE CHARACTERIZED AS RESIDENTIAL	19
CONCLUSION	22

TABLE OF AUTHORITIES

CASES: Page

Abbate v. *United States*, 359 U.S. 187 (1959)..... 11
A.L.A. Schechter Poultry Corp. v. *United States*, 295 U.S. 495 (1935)..... 15
Ardestani v. *INS*, 502 U.S. 129 (1991)..... 4
Asgrow Seed Co. v. *Winterboer*, 513 U.S. 179 (1995)..... 6
Bailey v. *United States*, 516 U.S. 137 (1995)..... 6
Brecht v. *Abrahamson*, 507 U.S. 619 (1993) 11
Cohens v. *Virginia*, 19 U.S. (6 Wheat) 264 (1821)..... 12
Edward D. DeBartolo Corp. v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568 (1988)..... 10
Engle v. *Isaac*, 456 U.S. 107 (1982)..... 11
Gibbons v. *Ogden*, 22 U.S. (9 Wheat) 1 (1824) 14
John Hancock Mut. Life Ins. Co. v. *Harris Trust & Sav. Bank*, 510 U.S. 86 (1993)..... 20
King v. *St. Vincent's Hosp.*, 502 U.S. 215 (1991). 7
Rowland v. *California Men's Colony*, 506 U.S. 194 (1993)..... 9
Russell v. *United States*, 471 U.S. 858 (1985).....*passim*
Russello v. *United States*, 464 U.S. 16 (1983)..... 5
Screws v. *United States*, 325 U.S. 91 (1945)..... 11
Smith v. *United States*, 508 U.S. 223 (1993)..... 6,7
United States v. *American Bldg. Maintenance Indus.*, 422 U.S. 721 (1975) 6
United States v. *Bass*, 404 U.S. 336 (1971)..... 18,19
United States v. *Denalli*, 73 F.3d 328 (11th Cir. 1996) 15
United States v. *Five Gambling Devices*, 346 U.S. 441 (1953)..... 10
United States v. *Gomez*, 87 F.3d 1093 (9th Cir. 1996) 8
United States v. *Gonzales*, 520 U.S. 1 (1997) 5

TABLE OF AUTHORITIES—Continued

Page

United States v. *Harrington*, 108 F.3d 1460 (D.C. Cir. 1997) 14
United States v. *Hickman*, 179 F.3d 230 (5th Cir. 1999), *pet. for cert. filed*, 68 U.S.L.W. 3178 (Sept. 16, 1999) (No. 99-464) 14
United States v. *Lopez*, 514 U.S. 549 (1995).....*passim*
United States v. *Mennuti*, 639 F.2d 107 (2d Cir. 1981) .....*passim*
United States v. *Nguyen*, 117 F.3d 796 (5th Cir.), *cert. denied*, 522 U.S. 987 (1997) 15
United States v. *Pappadopoulos*, 64 F.3d 522 (9th Cir. 1995) 14,15
United States v. *Ramey*, 24 F.3d 602 (4th Cir. 1994), *cert. denied*, 514 U.S. 1103 (1995)..... 7
United States v. *Robertson*, 514 U.S. 669 (1995).. 16,17
United States v. *Ron Pair Enters., Inc.*, 489 U.S. 235 (1989)..... 4,5
United States v. *Ryan*, 41 F.3d 361 (8th Cir. 1994), *cert. denied*, 514 U.S. 1082 (1995) 2,20
United States v. *Salvucci*, 448 U.S. 83 (1980)..... 21
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Wickard v. *Filburn*, 317 U.S. 111 (1942)..... 13,16
Zobrest v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993)..... 10

CONSTITUTION:

U.S. Const. art. I, § 8, cl. 3.....*passim*
U.S. Const. art. I, § 8, cl. 5..... 12
U.S. Const. art. I, § 8, cl. 10..... 12
U.S. Const. art. III, § 3..... 12

TABLE OF AUTHORITIES—Continued

Page

STATUTES:

18 U.S.C. § 844(i) ..... *passim*
18 U.S.C. § 1962(a) 17
28 U.S.C. § 2255 1
Organized Crime Control Act of 1970, Pub. L. No. 91-452 12

RULE:

S. Ct. R. 37.6 1

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TABLE OF AUTHORITIES—Continued

Page

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IN THE

Supreme Court of the United States

No. 99-5739

DEWEY J. JONES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF AMICUS CURIAE FOR DALE LYNN RYAN IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST OF AMICUS CURIAE[1]

Amicus Dale Lynn Ryan has an undeniable interest in the proper resolution of the question presented by this case: he is serving a sentence in federal prison in Oklahoma for his conviction—now on collateral review pursuant to 28 U.S.C. § 2255—of one count of destroying by fire a "building * * * used in * * * any activity affecting interstate * * * commerce," in violation of 18 U.S.C. § 844(i). The building in Mr. Ryan's

[1]Pursuant to S. Ct. Rule 37.6, amicus states that no counsel for any party to this case authored this brief in whole or in part and no person or entity other than amicus and his family made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief; copies of the consent letters have been filed with the Clerk.

case bore perhaps an even more attenuated link to interstate commerce than the one in this case.

When it was destroyed, the building in Mr. Ryan's case—which at one time had been a fitness center—was permanently closed, was not being used for any business purpose, and was not for sale or rent. After thoroughly investigating the fire, state and local authorities declined to bring charges. A year and a half later, however, federal authorities brought a one-count indictment against Mr. Ryan under Section 844(i)—the federal arson statute. To establish federal jurisdiction, the government argued that the building was *either* owned by an out-of-state resident, *or* supplied with natural gas from outside the State. That was enough—according to the prosecution—to give rise to a federal offense under Section 844(i).

Mr. Ryan was convicted and sentenced to 27 and 1/2 years imprisonment. A divided panel of the Court of Appeals for the Eighth Circuit affirmed the conviction. But the Eighth Circuit vacated that decision, and reheard the case en banc. By the slimmest margin (6-5), the en banc court affirmed. The dissent concluded that neither of the asserted connections with interstate commerce established that the building was "used" in an "activity" affecting interstate commerce, as Section 844(i) requires. Quite the contrary. The building was simply "cumbering the ground." *United States* v. *Ryan*, 41 F.3d 361, 369 (8th Cir. 1994) (Arnold, C.J., joined by McMi[illegible]n, Gibson, and Magill, JJ.), *cert. denied*, 514 U.S. 1082 (1995).[2]

Mr. Ryan's participation as an amicus in this case will provide the Court with a broader perspective on the sweeping manner in which Section 844(i) has been applied—including to property that is not strictly residential in character. Because his

[2]Judge Loken also dissented. He agreed with the four other dissenters that the jury instruction on the requisite nexus with interstate commerce under Section 844(i) was plainly erroneous, but wrote separately. *See* 41 F.3d at 370.

conviction remains on collateral appeal, he has a compelling interest in seeing that the Court takes this opportunity to limit Section 844(i) to its congressionally intended—not to mention constitutionally permissible—reach.

SUMMARY OF ARGUMENT

To establish the proper reach of Section 844(i), the Court need go no further than the text of the statute itself. First, Section 844(i) potentially covers the arson of "any building" and, thus, precludes any categorical distinction between residential or commercial buildings. Second, while no particular type of building is excluded, Section 844(i) only applies to buildings that are "used" in an "activity" affecting interstate commerce. This significantly limits the reach of Section 844(i) because it requires that the building itself be *actively employed* in an activity affecting interstate commerce. A passive, passing, or past connection with interstate commerce—such as the fact that a building is heated with natural gas from outside the State—does not suffice. In common parlance, private homes ordinarily are not "used" in an "activity" affecting interstate commerce, and thus typically are not covered by Section 844(i). That is true with respect to the residence in this case.

Construing Section 844(i) to cover any building with such an attenuated connection with interstate commerce as the fact that it receives natural gas from another State would extend the statute to practically every building in the land. That, in turn, would cast serious doubt on the constitutionality of the statute, which this Court should seek to avoid. As this Court recently observed in *United States* v. *Lopez*, 514 U.S. 549, 561 n.3 (1995) (quotations omitted), "[u]nder our federal system, the States possess primary authority for defining and enforcing the criminal law." This Court, accordingly, should be especially wary of construing federal statutes in a way that would criminalize purely local offenses—such as simple arson—that have for centuries been policed exclusively by the States.

Because the federal government lacks the authority to act as the neighborhood cop, Section 844(i) must be tested under Congress' power "[t]o regulate commerce * * * among the several States." U.S. Const. art. I, § 8, cl. 3. As *Lopez* underscores, the commerce power is broad but not absolute. When, as here, Congress is not regulating the channels or instrumentalities of interstate commerce, its commerce power is limited to activities that "*substantially* affect interstate commerce." 514 U.S. at 559 (emphasis added). As a result, Section 844(i) cannot—as a constitutional matter—be applied to buildings that have only de minimis connections with interstate commerce.

The fact that Section 844(i) contains a jurisdictional element requiring a case-by-case inquiry into the effect on interstate commerce does not free the statute from this constitutional tether. To save a statute that would otherwise exceed Congress' commerce power, a jurisdictional element must be meaningful. For Section 844(i), this means the government must prove that the building was used in an activity that had a substantial effect on interstate commerce. Any other conclusion would eliminate the "distinction between what is truly national and what is truly local," give the federal government free reign in an area—"criminal law enforcement"—over which "the States historically have been sovereign," 514 U.S. at 564, 567-568, and all but read a Criminal Affairs Clause into Article I. In any event, the Court can avoid any constitutional infirmity by simply construing Section 844(i) according to its terms.

ARGUMENT

I. BY ITS TERMS, SECTION 844(i) ONLY APPLIES TO THE ARSON OF BUILDINGS "USED" IN AN "ACTIVITY" AFFECTING INTERSTATE COMMERCE, AND THUS ORDINARILY DOES NOT EXTEND TO PRIVATE HOMES.

1. As with any statute, the starting point in determining the reach of Section 844(i) is the language of the statute itself. *See Ardestani* v. *INS*, 502 U.S. 129, 135 (1991); *United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989). Section 844(i) provides in pertinent part: "Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building * * * used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned * * *." 18 U.S.C. § 844(i). The statute's reach is accordingly grounded expressly on the *use* of the property destroyed by arson. Two principles inform that jurisdictional determination.

a. First, all *types* of buildings can qualify under Section 844(i), since the statute potentially covers the arson of "any building." *Id. See United States* v. *Gonzales*, 520 U.S. 1, 5 (1997) ("Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'") (quoting *Webster's Third New International Dictionary* 97 (1976)). As a result, Section 844(i) precludes any sort of categorical distinction between residential and commercial buildings. In fact, in enacting Section 844(i), Congress specifically revised an earlier version of the bill "to eliminate the words 'for business purposes' from the description of covered property." *Russell* v. *United States*, 471 U.S. 858, 861-862 (1985) (quoting draft bill). *See id.* at 862 & nn.5-7 (discussing legislative history); *Russello* v. *United States*, 464 U.S. 16, 23-24 (1983) ("Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended").[3]

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[3]During the hearings on the proposed bill, Department of Justice officials testified that the provision was intended to reach only property used for business purposes. *See Explosives Control: Hearings on H.R. 17154, H.R. 16699, H.R. 18573 and Related Proposals Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 91st Cong., 2d Sess. 73-74 (1970) (testimony of W. Wilson and M. Abbell). Other witnesses testified that the provision should not be confined to property used for business purposes, urging instead that it be expanded to cover the arson of schools, churches, police stations, and even private homes. *See id.* at 78-79 (Rep. Smith), 289 (Rep. Goldwater), 300 (Rep. Wylie). The subcommittee deleted the phrase

b. Second, while no specific type of building is necessarily beyond the reach of Section 844(i), "the statute *only* applies to property that is 'used' in an 'activity' that affects commerce." *Russell*, 471 U.S. at 862 (emphasis added).[4] As this Court has recognized, while "variously defined," the word "use" ordinarily connotes "action and implementation," or "active employment." *Bailey* v. *United States*, 516 U.S. 137, 143, 145 (1995). *See Smith* v. *United States*, 508 U.S. 223, 229 (1993) ("'to use'" means "'to convert to one's service' or 'to employ'") (quoting dictionary); *see also Asgrow Seed Co.* v. *Winterboer*, 513 U.S. 179, 187 (1995) ("When terms used in a statute are undefined, we give them their ordinary meaning."). Section 844(i) thus requires that the building itself be actively employed in—if not converted to the service of—an activity affecting interstate commerce; a building's passive, passing, or past connection with interstate commerce does not suffice.

Judge Friendly put it this way:

> The critical word here is "used." Congress did not define the crime described in § 844(i) as the explosion of a building whose damage or destruction might affect interstate commerce as we assume it could constitutionally have done. *It chose to require that the damaged or destroyed property must itself have been used in commerce or in an activity affecting commerce.* [*United States* v. *Mennuti*, 639 F.2d 107, 110 (2d Cir. 1981) (emphasis added).]

"used for business purposes" and Congress enacted Section 844(i) without it.

[4]Section 844(i) applies to "any building * * * used [1] in interstate or foreign commerce or [2] in any activity affecting interstate or foreign commerce." 18 U.S.C. § 844(i) (brackets added). In construing the reach of Section 844(i), this Court and the lower courts have focused on the latter clause because—due to the "affecting" interstate commerce language—the latter clause is broader than the first. *See United States* v. *American Bldg. Maintenance Indus.*, 422 U.S. 271, 279-280 (1975). Accordingly, we focus on the reach of the latter clause here.

To the extent there is any uncertainty over the significance of "used," "the remainder of [Section 844(i)] appropriately sets it to rest." *Smith* v. *United States*, 508 U.S. at 233. *See also King* v. *St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) ("[T]he meaning of statutory language, plain or not, depends on context."). As the Court recognized in *Russell*, 471 U.S. at 862, Section 844(i) provides that the building must be "'used' in an 'activity' that affects commerce." "Activity" is commonly defined as "[t]he state of being active." *Webster's II New College Dictionary* 12 (1995). The use of "activity" in close conjunction with "used" underscores that Congress intended to limit Section 844(i) to buildings *actively employed* in—not simply in some way connected to—interstate commerce. Moreover, while Congress has included an interstate commerce-nexus requirement in several criminal statutes, Section 844(i) is apparently unique in establishing this "active employment in interstate commerce" requirement.

2. Applying these textual principles to the instant case compels the conclusion that Section 844(i) does not extend to the building at issue. First, the fact that the building is a private residence does not automatically exclude it from Section 844(i). Even a home may be "used" in an "activity" affecting interstate commerce; for example, many people use their homes—and for tax purposes declare them—as a home office. But the typical activity for which a home is used is "daily living"—not interstate commerce. *United States* v. *Ramey*, 24 F.3d 602, 610 (4th Cir. 1994) (Michael, J., concurring in part and dissenting in part), *cert. denied*, 514 U.S. 1103 (1995). There is no evidence that the home in this case was used for anything but "daily living." In holding that the residence was nevertheless covered by Section 844(i), the Court of Appeals pointed out that "the owner of the residence purchased natural gas in interstate commerce, secured a mortgage from an out-of-state lender, and received an insurance check from an out-of-state insurer." Pet.

App. 2a.[5] But in plain English neither natural gas consumption nor being mortgaged or insured is an *activity* for which a home is *used*.

As the Court of Appeals acknowledged, moreover, "these interstate connections are pretty slight." *Id.* They are scarcely more probative in establishing that the building is used in an activity affecting interstate commerce than is the fact that the owner who sleeps there happens to be a traveling salesman. Perhaps such links would establish "that the quantum of commerce might differ if the dwelling had never been built, were destroyed or were rebuilt." *Mennuti*, 639 F.2d at 110. But that "is not enough under the statute." *Id.* Section 844(i) "require[s] that the damaged or destroyed property must *itself* have been used in commerce or in an activity affecting commerce." *Id.* (emphasis added). "The pictures summoned up by these words include such things as railroad stations, bus depots, airport buildings, and factories," as well as offices in which business is transacted across state lines and "hotels and restaurants." *See id.* at 109. Not the house next door.

Russell does not compel a contrary construction. The building in that case was a "two-unit apartment building that is used as rental property," and "treated [by the owner] as business

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[5] In finding the requisite nexus with interstate commerce present, the Court of Appeals also relied on the effect that arson has on commerce each year on a *nationwide* basis. Pet. App. 3a. Whether or not such an "aggregation" analysis squares with this Court's current Commerce Clause jurisprudence, which we discuss in Part II, *infra*, the analysis does not accord with the inquiry called for by the statute. As discussed, Section 844(i) makes coverage dependent on whether the *building itself* giving rise to the offense is "used" in an "activity" affecting interstate commerce, not whether arson in general has an aggregate effect on interstate commerce. *See United States* v. *Gomez*, 87 F.3d 1093, 1096 (9th Cir. 1996) ("According to the plain language of the statute, the interstate commerce aspect of the crime is distinct from the arson—*it depends solely on what the property had been used for* (or whether the property was moving in interstate commerce).") (emphasis added).

property for tax purposes." 471 U.S. at 858-859. While the Court recognized that Section 844(i) "only applies to property that is 'used' in an 'activity' that affects commerce," it found that "[t]he rental of real estate is unquestionably such an activity." *Id.* at 862. The building in this case is not used in any comparable activity. In *Russell* the United States argued—as a first and independent reason why Section 844(i) applied —that "[t]he building was heated by gas that moved in interstate commerce." Br. for United States in No. 84-435, at 6; *see id.* 15-16. But the *Russell* Court ignored this argument. Moreover, the *Russell* Court specifically acknowledged that while Section 844(i) may have a broad reach, it was unlikely that it covered "every private home." 471 U.S. at 862. It does not cover the private home here, which—quite unlike the apartment building in *Russell*—was not used in the interstate rental market, or in any other activity affecting interstate commerce.[6]

Practically every building is built with supplies that have moved in interstate commerce, served by utilities that have an interstate connection, financed or insured by institutions that do business across state lines, or bears some other trace of interstate commerce. If that is enough to trigger Section 844(i), then the statute has no limit at all, and thus authorizes the federal government to police offenses—like the burning of the private dwelling in this case—that historically have been dealt with by the local constable. That result no doubt would strike some—the Framers come to mind—as absurd. *See Rowland* v. *California Men's Colony*, 506 U.S. 194, 200 & n.3 (1993) (a "common mandate of statutory construction [is] to avoid absurd results"); *cf.* Henry J. Friendly, *Federal Jurisdiction: A General View* 61

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[6] In *Mennuti* Judge Friendly observed that "the fact that a dwelling was *advertised* for rental" would not be sufficient to trigger Section 844(i). 639 F.2d at 110 (emphasis added). But he did not reach the question decided in *Russell*. While some courts have questioned the reasoning of *Mennuti* following *Russell*, Judge Friendly's reading of Section 844(i) remains as forceful today as the day *Mennuti* was decided.

(1973) ("The Founding Fathers, I think, would have been surprised to find the federal courts trying cases of corruption in the New York City administration simply because one of the participants had rowed across the Hudson in the course of the criminal venture."). But more important, this open-ended construction of Section 844(i) casts doubt on the constitutionality of the statute, which this Court should avoid.

II. ANY DOUBT ABOUT THE REACH OF SECTION 844(i) TO THE ARSON OF BUILDINGS, SUCH AS THE ONE IN THIS CASE, WITH ONLY ATTENUATED TIES TO INTERSTATE COMMERCE SHOULD BE AVOIDED BY CONSTRUING THE STATUTE IN LIGHT OF *UNITED STATES* v. *LOPEZ*.

1. "It is a familiar principle of our jurisprudence that federal courts will not pass on the constitutionality of an Act of Congress if a construction of the Act is fairly possible by which the constitutional question can be avoided." *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 7 (1993). *See Edward D. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *United States* v. *Five Gambling Devices*, 346 U.S. 441, 448 (1953) (Opinion of Jackson, J.). As explained next, the Court of Appeals' construction of Section 844(i)—which would extend the statute to practically every building in America—would result in the conclusion that Congress has exceeded its Commerce Clause authority and, in doing so, intruded into an area in which the "States historically have been sovereign." *United States* v. *Lopez*, 514 U.S. at 564.

2. In *Russell*, 471 U.S. at 859, this Court observed without extended analysis that in enacting Section 844(i) Congress intended "to exercise its full power under the Commerce Clause." That conclusion does not follow from the plain meaning interpretation discussed in Part I, *supra*, or, indeed, from the interpretation reached by the *Russell* Court itself. *See* 471 U.S. at 862 ("By its terms, * * * the statute *only* applies to property that is 'used' in an 'activity' that affects commerce.")

(emphasis added). But even assuming Congress intended Section 844(i) to have the furthest constitutional reach, that does not end the inquiry here. As the pathbreaking *Lopez* decision underscores, "the power to regulate commerce, though broad indeed, has limits that the Court has ample power to enforce." 514 U.S. at 557 (quotations and brackets omitted). These limits are critical to the "federal balance" that is an "essential * * * part of our constitutional structure," and "vital" to "securing [the] freedom" bequeathed by our forebears. *Id.* at 575, 578 (Kennedy, J., joined by O'Connor, J., concurring).

a. "Under our federal system, the 'States possess primary authority for defining and enforcing the criminal law.'" *Id.* at 561 n.3 (quoting *Brecht* v. *Abrahamson*, 507 U.S. 619, 635 (1993); *Engle* v. *Isaac*, 456 U.S. 107, 128 (1982)). *See Lopez*, 514 U.S. at 564 ("States historically have been sovereign" in the area of "criminal law enforcement"); *Abbate* v. *United States*, 359 U.S. 187, 195 (1959) ("principal responsibility for defining and prosecuting crimes" resides with the States); *Screws* v. *United States*, 325 U.S. 91, 109 (1945) ("Our national government is one of delegated powers alone. Under our federal system the administration of criminal justice rests with the States except as Congress, acting within the scope of those delegated powers, has created offenses against the United States.") (Opinion of Douglas, J.). That is certainly true when it comes to the common law offense of arson.

The offense of arson has been around nearly as long as the wooden dwelling; it spread to America with the colonists; and it has been codified by the States since the time of our founding. *See generally* John W. Poulos, *The Metamorphosis of the Law of Arson*, 51 Mo. L. Rev. 295 (1986); John Panneton, *Federalizing Fires: The Evolving Federal Response to Arson Related Crimes*, 23 Am. Crim. L. Rev. 151 (1985). Congress did not attempt to "federalize" arson until almost two hundred years after the founding, when it enacted Section 844(i) as part of

Title XI of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 1102.[7] When Congress did so, "it effect[ed] a change in the sensitive relation between federal and state criminal jurisdiction." *Lopez*, 514 U.S. at 561 n.3 (quotations omitted). And if Section 844(i) was in fact intended to have the sweeping construction given to it by the Court of Appeals below, Congress overstepped its Article I bounds.

b. Article I has no Criminal Affairs Clause. Instead, it enumerates specific offenses—such as "counterfeiting," U.S. Const. art. I, § 8, cl. 5—that Congress is authorized to punish.[8] Based on the Constitution's text and structure—as well as the fact that "States historically have been sovereign" in the area of "criminal law enforcement"—this Court has held that the Constitution "*withhold[s]* from Congress a plenary police power." *Lopez*, 514 U.S. at 564, 566 (emphasis added). *See Cohens* v. *Virginia*, 19 U.S. (6 Wheat) 264, 428 (1821) (it is "clear[] that Congress cannot punish felonies generally"). That power was reserved to the States. As a result, Congress' authority to make a federal offense out of arson (or any other offense not enumerated in Article I) must stem from its authority "[t]o regulate

[7] Prior to the enactment of Section 844(i)—which initially applied only to buildings damaged or destroyed by "explosive[s]," but was broadened in 1982 to cover buildings harmed by "fire"—the federal law of arson was limited to uniquely federal concerns, *e.g.*, federal territories and Indian reservations, federal buildings, and admiralty. *See* Thomas J. Egan, *The Jurisdictional Element of 18 U.S.C. § 844(i), A Federal Criminal Commerce Clause Statute*, 48 Wash. U.J. Urb. & Contemp. L. 183, 194-197 (1995).

[8] Article I empowers Congress to punish "counterfeiting," U.S. Const. art. I, § 8, cl. 5, "Piracies and Felonies committed on the high Seas," *id.* art. I, § 8, cl. 10, and "Offenses against the law of nations." *Id.* In addition, Article III establishes the federal offense of "treason." *Id.* art. III, § 3. The fact that the Framers singled out specific criminal offenses for federal legislation or attention provides further indication that they did not intend to give Congress the authority to federalize what amount to local criminal offenses.

commerce * * * among the several States." U.S. Const. art. I, § 8, cl. 3.

As this Court explained in *Lopez*, the commerce power authorizes Congress to enact three classes of legislation:

> First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce * * *. Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce. [514 U.S. at 558-559 (citations omitted).]

As was true with respect to the statute in *Lopez*, Section 844(i) does not fall into either of the first two categories. "Thus, if [Section 844(i)] is to be sustained, it must be under the third category as a regulation of an activity that *substantially* affects interstate commerce." *Id.* at 559 (emphasis added).

In the third category, the Court has "upheld a wide variety of congressional Acts regulating intrastate economic activity where * * * the activity substantially affected interstate commerce." *Id.* The high-water mark is *Wickard* v. *Filburn*, 317 U.S. 111 (1942), which involved the regulation of the production and use of homegrown wheat; other "[e]xamples include the regulation of intrastate coal mining, intrastate extortionate credit transactions, restaurants utilizing substantial interstate supplies, inns and hotels catering to interstate guests." *Lopez*, 514 U.S. at 559 (citations omitted). Each of these examples involved regulation of "*economic* activity * * * substantially affect[ing] interstate commerce." *Id.* at 560 (emphasis added). As was true for the criminal statute challenged in *Lopez*, *see id.* at 561, the conduct proscribed by Section 844(i)—arson—"has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." *Id. See*

United States v. *Pappadopoulos*, 64 F.3d 522, 526 (9th Cir. 1995).[9]

c. Unlike the statute struck down in *Lopez*, Section 844(i) contains a jurisdictional element requiring an individualized inquiry into the effect on interstate commerce in each case. As discussed, to trigger Section 844(i) the government must prove that the building was "used" in an "activity" affecting interstate commerce. Some lower courts have pointed to Section 844(i)'s jurisdictional element and—in talismanic fashion—simply thrown *Lopez* to the wind. *See, e.g., United States* v. *Sherlin*, 67 F.3d 1208, 1213-14 (6th Cir. 1995), *cert. denied*, 516 U.S. 1082 (1996). But while the inclusion of a jurisdictional element may save an otherwise *ultra vires* statute, the element itself must have constitutionally meaningful content.

Put somewhat differently, "[a] jurisdictional element by itself cannot save a statute that exceeds congressional authority. The jurisdictional element must in some way be meaningful, and the Supreme Court has specified a condition for meaningfulness in its substantial effects test." *United States* v. *Hickman*, 179 F.3d 230, 240-241 (5th Cir. 1999) (Higginbotham, J., joined by Jolly, Jones, Smith, Duhe, Barksdale, E. Garza, and DeMoss, JJ., dissenting from equally divided affirmance of conviction for local robberies under Hobbs Act), *pet. for cert. filed*, 68 U.S.L.W. 3178 (Sept. 16, 1999) (No. 99-464). *See also United States* v. *Harrington*, 108 F.3d 1460, 1467 (D.C. Cir. 1997) ("*Lopez* reminds us that statutory jurisdictional elements must be taken seriously * * *. Only in that way can these statutory provisions serve their intended purpose of protecting the *Lopez* Court's 'first principles'") (quoting *Lopez*,

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[9] While the Court need not go so far to decide this case, Congress' Commerce Clause power arguably does not extend to the type of criminal conduct regulated by Section 844(i) on the ground that it is not "commerce" in the first place. *See Gibbons* v. *Ogden*, 22 U.S. (9 Wheat) 1, 193 (1824) (essence of commerce is "commercial intercourse"); *Lopez*, 514 U.S. at 585-588 (Thomas, J., concurring).

514 U.S. at 552); William Brian Gaddy, *A Review of Constitutional Principles to Limit the Reach of Federal Criminal Statutes*, 67 U.M.K.C. L. Rev. 209, 218 n.73 (1999) (unless given teeth, "a jurisdictional element is only constitutional 'window dressing'").

For Section 844(i), this means that in establishing that a building is "used" in an "activity" affecting interstate commerce—and, thus, covered—the government must prove *more* than that the building has a de minimis connection with commerce. "[T]he government must * * * point[] to a 'substantial' effect on or connection to interstate commerce." *Pappadopoulos*, 64 F.3d at 527. *Accord United States* v. *Denalli*, 73 F.3d 328, 330 (11th Cir. 1996); *see also United States* v. *Nguyen*, 117 F.3d 796, 799 (5th Cir. 1997) ("The substantial effects test articulates the limit" of Section 844(i)'s jurisdictional reach) (Jones, J., dissenting), *cert. denied*, 522 U.S. 987 (1997). Even the Court of Appeals below acknowledged that this threshold cannot be satisfied on the record here. *See* Pet. App. 2a (the alleged "interstate connections * * * don't establish a 'substantial' connection between this arson (or this residence) and interstate commerce").

Lowering the bar to require merely the type of attenuated ties with interstate commerce asserted in this case would erase the "distinction between what is truly national and what is truly local," *Lopez*, 514 U.S. at 567-568, and permit the federal government to assume essentially the same role as the States in policing local crime. *Cf. A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495, 554 (1935) ("There is a view of causation that would obliterate the distinction between what is national and what is local in the activities of commerce.") (Cardozo, J., concurring). Simple robbery, burglary, or arson could all be "federalized," with the caveat that the government need show an individualized connection—however slight or far-flung—with interstate commerce. That is no limit at all on the federal authority enumerated in Article I.

Invariably, the building destroyed by arson will be built with materials from out-of-state, the goods (or money) stolen from the victim's bag will have traveled in interstate commerce, or the window pane broken by the burglar will have been made of glass from outside the State. "In a sense any conduct in this interdependent world of ours has an ultimate commercial origin or consequence, but we have not yet said the commerce power may reach so far." *Lopez*, 514 U.S. at 580 (Kennedy, J., joined by O'Connor, J., concurring). There is no reason to do so here.

The *Wickard* line cannot be extended—further—to legitimize the prosecution in this case. In those cases, the Court held that "[w]here *economic activity* substantially affects interstate commerce" in the aggregate, "legislation regulating that activity will be sustained," even where individual instances of the regulated activity have only a remote effect on interstate commerce. *Lopez*, 514 U.S. at 560 (emphasis added). In this case as in *Lopez*, by contrast, the activity being regulated by Congress—arson—is not "an essential part" of any "larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Id.* at 561; *see* note 9, *supra*. Indeed, the regulated conduct is not economic at all. The regulation of such non-economic activity stands on different constitutional footing and, at a minimum, is not entitled to review under the sweeping *Wickard* rationale.

Unlike interstate commerce, arson is not singled out for federal regulation in Article I. Quite the contrary. "Under our federal system, *the States* possess primary authority for defining and enforcing the criminal law." *Lopez*, 514 U.S. at 561 n.3 (quotations omitted; emphasis added). The historical—not to mention constitutional—role reserved to the States for policing local crime should resolve any doubt that Section 844(i)'s jurisdictional element must be given teeth.[10]

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[10]This Court's per curiam decision in *United States* v. *Robertson*, 514 U.S. 669 (1995), is not to the contrary. There, the Court upheld a federal RICO conviction under 18 U.S.C. § 1962(a), which, *inter alia*, prohibits investing the proceeds of unlawful activities in "any enterprise engaged in, or the activities of which affect, interstate or foreign commerce." The evidence in that case showed that the defendant had invested narcotics proceeds in an Alaskan gold mine. While prohibited by federal law, the investment of such proceeds was an economic activity. Moreover, the evidence showed that as part of his illegal investment scheme the defendant bought and transported goods in interstate commerce. As a result, the Court was able to conclude unanimously that the defendant and his mine were "engaged in" interstate commerce. *See id.* at 671-672. The evidence of commerce in *Robertson* was so abundant that the Court's brief per curiam decision does not begin to probe the more difficult constitutional issues presented by the conviction—and statute—challenged here.

d. In considering the reach of Section 844(i), the Court "must inquire whether the exercise of national power seeks to intrude upon an area of traditional state concern." *Lopez*, 514 U.S. at 580 (Kennedy, J., joined by O'Connor, J., concurring). Here as in *Lopez*, that inquiry must be answered in the affirmative. State and local governments have for centuries policed the type of neighborhood arson giving rise to this case. Moreover, if given the sweeping construction embraced by the Court of Appeals below, Section 844(i) would contribute to the broad federalization of local crimes. *See* Greg Hollon, *After the Federalization Binge: A Civil Liberties Hangover*, 31 Harv.C.R.-C.L.L. Rev. 499, 499 (1996) ("Since the 1970s, Congress has vastly increased the federal government's jurisdiction over crime" by "criminaliz[ing] a variety of activities traditionally considered to be purely state matters."); Task Force on the Federalization of Criminal Law, American Bar Ass'n, *Federalization of Criminal Law* 7-9 (1998) (same).[11]

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[11] "Prior to the Civil War, only a small number of federal offenses existed"—typically related to matters of unique federal concern—"and there was little if any overlap between the offenses subject to federal and state prosecution." Sara Sun Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 Hastings L.J. 979, 981 n.11 (1995). The number of federal offenses grew with the expansion of federal power after the Civil War, blossomed in the New Deal

The effect of this trend on the federal balance is not simply palpable, it is alarming. As the Head of the Federal Judiciary recently admonished, the federalization of criminal law "threatens to change entirely the nature of our federal system." William H. Rehnquist, *1998 Year-End Report on the Federal Judiciary* 4 (1999). *See also* William H. Rehnquist, *Seen in a Glass Darkly: The Future of Federal Courts*, 1993 Wis. L. Rev. 1, 6 (1993) ("Most federal judges have serious concerns about the numbers and types of crimes now being funnelled into the federal courts."). Indeed, "the intrusion on state sovereignty" effected by the Gun-Free Schools Zone Act of 1990 held unconstitutional in *Lopez* was itself "significant." 514 U.S. at 583 (Kennedy, J., joined by O'Connor, J., concurring). The same goes for the intrusion perpetrated by Section 844(i), when applied in the manner challenged below.[12]

As a matter of statutory construction, this threat also counsels in favor of limiting Section 844(i) to its terms. "[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *United*

Era, and flourished again in the 1960s and 70s. *See* Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 Hastings L.J. 1135, 1137-45 (1995). Today, there are "more than 3,000 federal crimes on the books." Brickey, *supra*, at 1135 n.1.

[12] The federalization of local criminal offenses imposes other "serious costs." Andrew Weis, *Commerce Clause in the Cross-Hairs: The Use of* Lopez*-Based Motions to Challenge the Constitutionality of Federal Criminal Statutes*, 48 Stan. L. Rev. 1431, 1439 (1996). For example, "new federal crimes further burden an already overburdened federal judicial system," and create "serious inequities among similarly situated defendants," due to the different procedural protections that defendants enjoy in state versus federal court and the different sentencing ranges that exist for the same crime depending on whether it is prosecuted in federal or state court. *Id.* This results in a "cruel lottery," in which some defendants are singled out for federal prosecution and subjected to harsher penalties. *Id.* at 1439 n.48. Another collateral cost of—and objective indication of—the federalization of local crimes is the dramatic increase in the federal prison population in the past few decades. *See* Gaddy, *supra*, at 209 n.3.

States v. *Bass*, 404 U.S. 336, 349 (1971). As this Court has recognized on numerous occasions, "Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States." *Id.* at 349 n.16 (citing cases). As a result, the Court will not "assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction" without a "clear statement" to that effect. *Id.* The absence of any such clear statement in Section 844(i) is all the more reason to construe the statute in a manner that would avoid all constitutional doubt.

* * *

"'The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.'" *Lopez*, 514 U.S. at 552 (quoting *The Federalist No. 45* at 292-293 (C. Rossiter ed. 1961)). The question whether Congress has stepped over the line of permissible regulation of interstate commerce into regulation of an area—such as criminal law enforcement—in which the States have historically been sovereign "is necessarily one of degree." *Lopez*, 514 U.S. at 566 (quotations omitted). But in this case, construing Section 844(i) to reach the type of simple arson prosecuted below would all but extinguish the line between federal and state power.

III. NEITHER SECTION 844(i) NOR THE CONSTITUTION COUNSELS IN FAVOR OF ADOPTING A LIMITING PRINCIPLE BASED SOLELY ON WHETHER OR NOT A BUILDING MAY BE CHARACTERIZED AS RESIDENTIAL.

In most cases, a proper construction of Section 844(i) will preclude federal prosecution for the arson of a private home. That is plainly so here. But in deciding this case, the Court should avoid adopting any limiting principle based solely on whether or not a building is residential. Such a principle would be flatly inconsistent with Section 844(i), which—as discussed—potentially covers "*any* building" meeting the statutory

criteria. 18 U.S.C. § 844(i) (emphasis added). Indeed, given the legislative history of Section 844(i), adopting a residential/commercial distinction for determining what buildings are covered would resurrect the "discarded draft" of the statute. *See supra* at 5; *John Hancock Mut. Life Ins. Co.* v. *Harris Trust & Sav. Bank*, 510 U.S. 86, 101 (1993) (In construing a statute, "[w]e are directed by [its] words, and not by the discarded draft.").

Moreover, while private residences are ordinarily not covered by Section 844(i), there may be exceptions. Some homes —like those with prototypical home offices—may well be used in an activity affecting interstate commerce, and thus be covered by Section 844(i). Conversely, not all non-residential buildings are automatically covered by Section 844(i). Mr. Ryan's case is a good example. As noted, he was prosecuted under Section 844(i) for destroying a building that—while previously a fitness center—was at the time of the fire permanently closed, not serving any business function, and not for sale or rent. In short, the building "was not being 'used' in any 'activity'" at all; it "was just cumbering the ground." *United States* v. *Ryan*, 41 F.3d at 369 (dissent). Accordingly, while the building giving rise to Mr. Ryan's conviction may not have been residential, it nevertheless falls outside the reach of Section 844(i) under the statutory and constitutional analysis set forth above. *See also Mennuti*, 639 F.2d at 113 (Section 844(i) is "limited [in] its reach to property *currently* used in commerce or in an activity affecting it, leaving other cases to enforcement by the states") (emphasis added).

Furthermore, Congress' Commerce Clause power does not fluctuate based solely on whether or not property is residential in character. "[T]he proper test requires an analysis of whether the regulated activity 'substantially affects' interstate commerce." *Lopez*, 514 U.S. at 559. Of course, the residential or commercial character of the property whose use is being regulated (or protected) by Congress may bear on the question whether Congress has properly exercised its Commerce Clause

authority. But that is "neither the beginning nor the end of this Court's inquiry." *United States* v. *Salvucci*, 448 U.S. 83, 91 (1980). Few would contend, for example, that Congress could criminalize the damage or destruction of neighborhood lemonade stands; on the other hand, Congress' commerce power almost certainly extends to private homes with home offices used to conduct interstate business. In deciding this case, the Court should avoid adding another wrinkle to an already "[un]clear" area of law (*Lopez*, 514 U.S. at 559) by holding that the constitutional reach of Section 844(i) depends solely on whether or not a building is residential in character.[13]

---

[13] Eschewing a commercial/residential distinction in construing Section 844(i) also accords with the approach taken at common law. At common law, arson—like burglary—only applied to the "dwelling house," or inhabited home. Poulos, *supra*, at 300. Litigation arose over whether a building was covered as a dwelling house. *Id.* at 300-303 & n.20. In resolving that question, "it was not the character of the building, such as the distinction between a commercial and a single family residence, but its use as a home that was important." *Id.* at 307. Thus, "[t]hough it was not arson at common law to maliciously burn shops, stores, warehouses, barns, and similar buildings * * *, such buildings were the subject of arson when a portion of the building was someone's dwelling house." *Id.* at 306-307.

Section 844(i)—like most state arson statutes—eliminates the common law "dwelling house" requirement. But it operates in a similar fashion. By its terms, the determination whether a building is covered by Section 844(i) it is not based on whether it is residential or commercial in character, but rather on whether it is "used" in an "activity" affecting interstate commerce. 18 U.S.C. § 844(i).

CONCLUSION

For the foregoing reasons, and those in petitioner's brief, the judgment below should be reversed.

Respectfully submitted,

JOHN G. ROBERTS, JR.*
GREGORY G. GARRE
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5810

*Counsel of Record

Counsel for Amicus Curiae

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Supreme Court of the United States

DEWEY J. JONES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

*Ronald D. Rotunda
504 E. Pennsylvania Avenue
Champaign, IL 61820
(217) 333-3459

Cato Institute
Roger Pilon
Timothy Lynch
Robert A. Levy
1000 Massachusetts Ave., NW
Washington, DC 20001
(202) 842-0200

Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

STATEMENT OF FACTS 2

SUMMARY OF ARGUMENT 4

ARGUMENT 7

I. COMMERCE CLAUSE JURISPRUDENCE SHOULD BE CONSISTENT WITH CONSTITUTIONAL THEORY AND DESIGN 7

A. The Constitution Establishes A Limited Government 9

B. The Commerce Clause Was Meant Not Only To Be Limited But To Serve Limited Government 11

II. EVEN AS UNDERSTOOD TODAY, THE COMMERCE CLAUSE DOES NOT AUTHORIZE CONGRESS TO PROHIBIT THE ARSON OF A PRIVATE RESIDENCE 21

CONCLUSION 29

TABLE OF AUTHORITIES

Page

CASES

Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564 (1997) 15

Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).... *passim*

Marbury v. Madison, 5 U.S. 137 (1803) 27

Maryland v. Wirtz, 392 U.S. 183 (1968)..... 24

McLain v. Real Estate Board of New Orleans, Inc., 444 U.S. 232 (1980) 25

New York v. United States, 505 U.S. 144 (1992) 6, 10

NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) 22

Perez v. United States, 402 U.S. 146 (1971) 5

United States v. Darby, 312 U.S. 100 (1941)..... 10

United States v. Dascenzo, 152 F.3d 1300 (11th Cir. 1998)..... 26

United States v. Denalli, 73 F.3d 328 (11th Cir. 1996), *modified on other grounds*, 90 F.3d 444 (1996)..... 3

United States v. Jones, 178 F.3d 479 (7th Cir. 1999) 2

United States v. Lopez, 514 U.S. 549 (1995) ..... *passim*

United States v. Pappadopoulos, 64 F.3d 522 (9th Cir 1995)..... 3

CONSTITUTION

U.S. Const. art. I, § 8.....9, 11, 12

U.S. Const. amend. IX 11

U.S. Const. amend. X.....9, 10

TABLE OF AUTHORITIES – Continued

Page

STATUTES

18 U.S.C. § 844(i)..... *passim*

18 U.S.C. § 924(c) 2

18 U.S.C. § 981 et seq..... 5

26 U.S.C. § 5861(f)..... 2

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AMERICAN BAR ASS'N, TASK FORCE ON THE FEDERALIZATION OF CRIMINAL LAW (1998) 7

Jonathon Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* (1901)..... 15

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Friedrich Hayek, *Law, Legislation, and Liberty* (1973)..... 17

John Locke, *Second Treatise of Government* (1690) 19

Nelson and Pushaw, *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations But Preserve State Control Over Social Issues*, 85 Iowa L. Rev. 1, 7 (1999)..... 8

Pilon, *Restoring Constitutional Government* (Cato's Letter No. 9, 1995) 1

Poulos, *The Metamorphosis of the Law of Arson*, 51 Mo. L. Rev. 295 (1996)..... 7

Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 Mich. L. Rev. 1091 (1986)..... 15

TABLE OF AUTHORITIES – Continued

Page

Rehnquist, *The 1998 Year-End Report on the Federal Judiciary* (1999) 7

Reynolds, *Kids, Guns, and the Commerce Clause: Is the Court Ready for Constitutional Government?* (Cato Policy Analysis No. 216, Oct. 10, 1994) 1

Ronald Rotunda and John E. Nowak, *Treatise on Constitutional Law* (1999) 1

Adam Smith, *Wealth of Nations* (1776) 17

The Federalist 7, 10, 11, 14

Laurence Tribe, *American Constitutional Law* (2000) 9

Charles Warren, *The Supreme Court in United States History* (1922) 25

INTEREST OF *AMICUS CURIAE*

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government, especially the idea that the U.S. Constitution establishes a government of delegated, enumerated, and thus limited powers. Toward that end, the Institute and the Center undertake a wide range of publications and programs: *e.g.*, Reynolds, *Kids, Guns, and the Commerce Clause: Is the Court Ready for Constitutional Government?* Cato Policy Analysis No. 216, Oct. 10, 1994; Pilon, *Restoring Constitutional Government*, Cato's Letter No. 9, 1995; "The Court Rediscovers Federalism: Is It the Real Thing?" Policy Forum featuring Ronald D. Rotunda and Lyle Denniston, Sept. 17, 1999. The instant case raises squarely the question of the limits on Congress's power under the doctrine of enumerated powers and is thus of central interest to the Cato Institute and its Center for Constitutional Studies.

This brief is co-authored with Professor Ronald D. Rotunda of the University of Illinois College of Law. Professor Rotunda has published voluminously on the subject of constitutional law and is co-author, with John E. Nowak, of the five-volume *Treatise on Constitutional Law*.[1]

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[1] In conformity with Supreme Court Rule 37, the *amicus* has obtained the consent of the parties to the filing of this brief and letters of consent have been filed with the Clerk. The *amicus* also states that counsel for a party did not author this brief in whole or in part; and no person or entities other than the *amicus*, its members, and counsel made a monetary contribution to the preparation and submission of this brief.

STATEMENT OF FACTS

On February 23, 1998, petitioner Dewey Jones went to the Fort Wayne, Indiana, home of his cousin, James Walker, who was not home at the time. After telling Walker's wife that Walker was avoiding him, Jones threw a lit Molotov cocktail into the living room of the home, causing fire damage. The Fort Wayne police and fire departments originally investigated the arson, but then notified the federal Bureau of Alcohol, Tobacco, and Firearms, which took over the investigation.

As a result of the latter investigation, a federal grand jury returned a three count indictment against Jones on March 25, 1998, charging him with one count of arson, in violation of 18 U.S.C. § 844(i); one count of making an illegal destructive device, in violation of 26 U.S.C. § 5861(f); and one count of using a destructive device during and in relation to a crime of violence punishable as a federal offense (*i.e.*, the arson charge), in violation of 18 U.S.C. § 924(c). On June 17, 1998, Jones was convicted on all counts in the United States District Court for the Northern District of Indiana. He was sentenced to 35 years in prison – over the objection of Walker that the sentence was excessive and far higher than the sentence Jones would have received in state court. The district court agreed that the sentence, mandated by statutory minima, was "probably . . . excessive." On May 17, 1999, the United States Court of Appeals for the Seventh Circuit upheld the conviction. *United States v. Jones*, 178 F.3d 479 (7th Cir. 1999).

The arson conviction under section 844(i), enacted under the Commerce Clause, was for setting fire to property "used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce." At trial, the government introduced no evidence to show that the Walkers conducted any business in their home or that the home was otherwise "used in" interstate or foreign commerce. Instead, the government introduced three items to satisfy the statute's jurisdictional element. First,

the mortgage on the Walker home was held by an out-of-state company. Second, the company that supplied natural gas to the home received gas from outside the state. Third, the Walkers' insurance company had its headquarters outside the state, although the insurance claim that resulted from the arson was settled by an agent based in Fort Wayne.

The district court held that, under Seventh Circuit precedent, the government was required to show only "a slight effect on interstate commerce" to satisfy the jurisdictional element of section 844(i), and that the natural gas connection alone would suffice. On appeal, the Seventh Circuit conceded that "these interstate connections are pretty slight for a single building; they don't establish a 'substantial' connection between this arson (or this residence) and interstate commerce." *Id.* at 480. Nevertheless, the court upheld the conviction for two reasons. First, it simply announced: "the residential housing industry is interstate in character" and arson can substantially affect it. *Id.* Second, "[i]f instead of asking whether 'residential real estate' substantially affects commerce we ask whether 'arson of buildings' or even 'arson of residences' substantially affects commerce, the answer must still be yes. . . . Most of these arsons also affected gas, electric, and telephone service, required the occupants to stay at hotels while repairs were completed, . . . led friends and loved ones to travel from other states to give comfort to the victims, and so on. This collective effect . . . permits the national government to establish substantive rules of conduct." *Id.* at 481.

The Seventh Circuit acknowledged that its decision conflicted with decisions of the Ninth and Eleventh Circuits that "have distinguished between commercial and residential property and held that the national government lacks the constitutional authority to punish arsons of residences," *id.* at 480 (citing *United States v. Pappadopoulos*, 64 F.3d 522 (9th Cir. 1995), and *United States v. Denalli*, 73 F.3d 328 (11th Cir.), *modified on other grounds*, 90 F.3d 444 (1996)).

SUMMARY OF ARGUMENT

The basic question in this case is whether Congress is authorized, under its power "[t]o regulate Commerce . . . among the several States," to make the arson of a private residence, which is already a crime in every state, a federal crime.

The Constitution establishes a government of delegated, enumerated, and thus limited powers, leaving most powers, including the general police power, with the states or the people. Under the Articles of Confederation, states had erected protectionist barriers that were interfering with the free flow of commerce among them. It was to break that logjam, in large measure, that a new constitution was written. The Constitution's Commerce Clause, in particular, gave Congress the power to override such barriers: under it, Congress could regulate – or make regular – commerce among the states. Indeed, in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), the nation's first great Commerce Clause case, this Court upheld a federal statute that did just that.

Today, however, that functional understanding of the Commerce Clause has been largely eclipsed, replaced by a far broader, nonfunctional conception that enables Congress to exercise what is, in effect, a general police power. Invoking its power to regulate interstate commerce, Congress today regulates virtually anything and everything, for reasons not remotely related to ensuring the free flow of goods and services among the states. In doing so, it pays lip service to the Constitution by announcing findings that the activity it wants to regulate – carjacking, arson of churches, violence against women, what have you – "affects" interstate commerce; alternatively, Congress includes a "jurisdictional element" in its statute, which amounts to asking courts to discern a similar connection on a case-by-case basis. Those processes, which involve piling inference upon inference, are a charade, and everyone knows it. This Court said as much when it observed recently, for the first time in nearly 60 years,

that if it were to accept the government's arguments, the Court would be "hard pressed to posit any activity by an individual that Congress is without power to regulate." *United States v. Lopez*, 514 U.S. 549, 564 (1995). And that would require the Court to conclude, it added, "that the Constitution's enumeration of powers does not presuppose something not enumerated. . . . This we are unwilling to do." *Id.* at 567-568. Given those "first principles," the Court found in *Lopez* that Congress had no power to prohibit the possession of a gun near a school because such possession "is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce." *Id.* at 567.

Those principles govern here too. This is a relatively simple case. Petitioner Jones was convicted of, among other things, setting fire to his cousin's private home, a state crime of arson that Congress made a federal crime under section 844(i), invoking its commerce power to do so. But arson of a private home "is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce." The activity regulated here does not pass the threshold test: it is not an "economic activity" or "commerce" as those terms are ordinarily understood.[2] It is not "interstate commerce" anymore than any purse snatching (or the aggregate of all purse snatchings) is "interstate commerce." It is common law arson, plain and simple.

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[2] Thus, *Perez v. United States*, 402 U.S. 146 (1971) is inapplicable. That case upheld the Consumer Credit Protection Act, 18 U.S.C. § 981 et seq. An extortionate credit transaction is a commercial activity. An arson (particularly an arson that is not an arson for hire) is not a commercial activity. Moreover, the evidence in *Perez* showed that a large part of the income of organized crime is "generated by extortionate credit transactions." There was no such showing in this case, nor could there be. An arson of a private home, unconnected to organized crime, is no more interstate commerce than a barroom brawl is interstate commerce.

Nor does the jurisdictional element in the statute save things. To satisfy that element, the government introduces the out-of-state mortgage, the out-of-state insurer, and the receipt of gas produced outside the state, all to show that the home was "used in interstate or foreign commerce or in an activity affecting interstate or foreign commerce." The home was not "used in" interstate or foreign commerce. Nor was it "used in" an activity affecting interstate or foreign commerce – unless mere residency is understood as "affecting" such commerce, in which case merely "to be" is "to affect." The "activity" that the home was "used in" was "residing." If Congress can regulate residing on so thin a ground it can regulate anything – and its powers are plenary. But this Court has announced many times that the federal government's powers are enumerated, not plenary.

The government is engaged here in the kind of transparent bootstrapping that is all too familiar in Commerce Clause cases. Indeed, it is precisely the kind of charade this Court cut through in *Lopez*. Under the substantial effects test this Court articulated there, section 844(i) cannot be applied in this case. At a deeper level, however, the difficulty of applying that test in a principled way – and in a way, in particular, that preserves our system of dual sovereignty – should give the Court pause about the correctness and practicality of the test and encourage it to move toward the original, functional understanding of the Commerce Clause.[3]

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[3] The federal government also has implied powers, of course, but those powers must be derived from an enumerated power. If the commerce power does not entail a particular power, then nothing is gained by invoking the Necessary and Proper Clause. Cf. *New York v. United States*, 505 U.S. 144 (1992).

ARGUMENT

I. COMMERCE CLAUSE JURISPRUDENCE SHOULD BE CONSISTENT WITH CONSTITUTIONAL THEORY AND DESIGN.

In this Court's most recent Commerce Clause case, *United States v. Lopez*, 514 U.S. 549 (1995), Chief Justice Rehnquist's opinion for the Court begins with the basic premise of the Constitution: "We start with first principles. The Constitution creates a Federal Government of enumerated powers." *Id.* at 552. It then quotes Madison's famous words from Federalist 45: "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." *Id.* And it concludes by observing that to uphold the government's expansive reading of its commerce power, the Court "would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *Id.* at 567.

In the present case, the government is asking the Court "to pile inference upon inference" in order to uphold the application of a federal arson statute, enacted under the Commerce Clause, that for all intents and purposes is little different than the garden variety arson statutes all states have enacted under their general police powers. *See* Poulos, *The Metamorphosis of the Law of Arson*, 51 Mo. L. Rev. 295 (1986). Given those many state statutes, the first question that arises is why it should be necessary for there to be a federal statute covering the identical ground. In its Brief at the petition stage, the government does not address that question; perhaps it assumes that redundancy in criminal statutes raises no problems, theoretical or practical. *See* Rehnquist, *The 1998 Year-End Report on the Federal Judiciary* (1999); AMERICAN

Bar Ass'n, Task Force on the Federalization of Criminal Law (1998).[4]

More deeply, however, neither the government's Brief nor the opinion below makes any effort to address the profoundly important issues of constitutional theory and structure that this Court raised in *Lopez*. The most important of those issues can be cast as a simple question: How can a single clause of the Constitution, the Commerce Clause, be read to subvert the very theory and structure of the document in which it rests? Stated differently, if the Constitution does indeed create a government of enumerated powers, few and defined, leaving most powers with the states or the people, how can one clause in it so undermine that plan?

The problem has not gone unnoticed, of course. In fact, a very recent study has pointed to what is perhaps the most important source of the problem: "Scholars have almost uniformly concluded that workable judicial rules of decision cannot be derived from the phrase 'Commerce among the several States.' " Nelson and Pushaw, *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control Over Social Issues* 85 Iowa L. Rev. 1, 7 (1999) (forthcoming). Indeed, the rules the modern Court has derived have led one of the nation's most prominent constitutional scholars to observe that "[t]he Court's application of its substantial effect and aggregation principles in the period between 1937 and 1995, combined with its deference to congressional findings, placed it in the increasingly untenable position of claiming the power to strike

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[4] Proponents of section 844(i) may argue that it is needed to prevent arson, but that is plainly wrong. Not surprisingly, the government introduced no evidence to show that states are unable to prohibit arsons due to, say, jurisdictional limitations. This federal law does not appropriate one extra dollar to hire more FBI agents to investigate residential arsons. Its purpose, apparently, is to convince voters that Congress is against arson.

down invocations of the Commerce Clause, while at the same time applying a set of doctrines that made it virtually impossible actually to exercise this power." Laurence H. Tribe, *American Constitutional Law* 816 (2000).

Lopez raised issues that have too long been ignored if constitutional government is to endure. Justice Thomas, in his concurrence in that case, said as much when he observed that the Court's decisions have "drifted far from the original understanding of the Commerce Clause," adding that the substantial effects test, "if taken to its logical extreme, would give Congress a 'police power' over all aspects of American life. Unfortunately, we have never come to grips with this implication of our substantial effects formula." *Lopez*, at 584 (Thomas, J., concurring). The modern understanding of the Commerce Clause undermines the Constitution's plan for limited government and dual sovereignty. Given that inconsistency, the modern understanding cannot be correct.

A. The Constitution Establishes a Limited Government.

Nothing could be more clear than that the Constitution establishes a government of limited powers. The federal government's powers were delegated by the founding generation and enumerated in the Constitution. By virtue of that enumeration they are limited. That understanding is implicit in the very first sentence of Article I: "All legislative Powers *herein granted* shall be vested in a Congress of the United States . . . " (emphasis added); by implication, not all powers were "herein granted," as Article I, section 8, makes clear. Thus, the Constitution begins with the idea of limited power. And it ends with it too, for the initial point is recapitulated, as if for emphasis, and made explicit in the final documentary evidence of the founding period, the Tenth Amendment: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are

reserved to the States respectively, or to the people." Although the Tenth Amendment has been called "but a truism," *United States v. Darby*, 312 U.S. 100, 124 (1941), *New York v. United States*, 505 U.S. 144, 156 (1992), it is a truism with a bite; for it makes it plain – not least by its prominence as the Framers' final founding statement – that the Constitution establishes a government of delegated, enumerated, and thus limited powers.

The testimonial evidence supporting that understanding would be more tedious than difficult to cite. In Federalist 39, for example, Madison wrote that "[The national government's] jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary of inviolable sovereignty over all other objects." Again, in Federalist 45 Madison wrote that "[t]he powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people. . . . " And even before the Tenth Amendment was added to the Constitution, its point was articulated by Hamilton in Federalist 32: "the rule that all authorities, of which the States are not explicitly divested in favor of the Union, remain with them in full vigor . . . is clearly admitted by the whole tenor . . . of the proposed Constitution." In sum, the new Constitution was understood by all to be instituting a government of limited powers.

Indeed, nothing could better demonstrate that the powers of the new government were meant to be limited than the debate surrounding calls for the addition of a bill of rights. Fearing that the federal government would not live within its enumerated powers, many in the founding generation, especially during the ratification debates, called for such a bill – for extra protection. Those opposed raised two main objections. First, a bill of rights was not necessary, due to enumeration. Second, because it would be impossible to enumerate all of our rights, the enumeration of some would be construed, by ordinary

principles of legal construction, as implying that rights not so enumerated were not meant to be protected. The Ninth Amendment was the remedy for the second objection: "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." In elaborating the first objection, however, Hamilton drove home the limiting effect of enumeration when he wrote in Federalist 84: "Why declare that things shall not be done which there is no power to do? Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?"

Nevertheless, to secure the Constitution's ratification by all of the states, a bill of rights proved ultimately to be necessary, of course. In truth, however, the Bill of Rights was, as some have since noted, an afterthought – however much it may have served over the years to better secure our liberties. Indeed, we went for two years without a bill of rights, secure in the belief that enumeration was our first line of defense against overweening government. Enumeration can serve that function, however, only as long as the powers enumerated are themselves understood as limited. Should one or a few prove to be effectively unlimited, enumeration is an empty promise.

B. The Commerce Clause Was Meant Not Only to Be Limited but to Serve Limited Government.

The Commerce Clause provides that Congress shall have the power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." As but one of the several powers delegated to Congress – as enumerated in Article I, section 8 – it must be understood in that context. In particular, it cannot be understood in a way that would render those other powers superfluous.

In his concurrence in *Lopez*, Justice Thomas made that point with great force when he wrote that this Court's

"substantial effects" test for determining the scope of the Commerce Clause, coupled with the Court's reading of the Necessary and Proper Clause, renders Congress's other Article I, section 8, powers "wholly superfluous." After listing several such powers, he concluded:

> Indeed, if Congress could regulate matters that substantially affect interstate commerce, there would have been no need to specify that Congress can regulate international trade and commerce with the Indians. . . . Put simply, much if not all of Art. I, § 8 (including portions of the Commerce Clause itself) would be surplusage if Congress had been given authority over matters that substantially affect interstate commerce. An interpretation of cl. 3 that makes the rest of § 8 superfluous simply cannot be correct. *Lopez*, at 588-589 (Thomas, J., concurring).

From a consideration of constitutional design alone, therefore, the scope of the commerce power must be understood to be limited. If the Commerce Clause is read as it most often is today, to effectively eviscerate the doctrine of enumerated powers, it is read not simply wrongly but fundamentally so. For such a reading eviscerates nothing less than limited constitutional government itself. A government that can regulate virtually anything and everything is not a limited government.

But there are other reasons too that compel the conclusion that the Commerce Clause was meant not only to be limited but to serve limited government. Several such reasons were brought out in Justice Thomas's discussion in *Lopez*, but one crucial point needs to be added – a point that Chief Justice Marshall himself made in *Gibbons*, but then never really developed. The issue in that case was whether a federal law licensing ships to engage in the "coasting trade," under which Gibbons operated, preempted a New York law granting a 30-year monopoly, held by Ogden, to ply the waters between New York and New Jersey. The effect of New York's monopoly grant, of

course, was to preclude Gibbons from operating under his federal license. Throughout his opinion, Marshall is concerned to give the text of the Commerce Clause, and the Constitution more generally, an accurate reading. Toward that end, however, he begins his argument not with the text but with a discussion about how to interpret constitutional text. Thus, he is concerned to avoid not only "an enlarged construction" but a "narrow construction, which would cripple the government, *and render it unequal to the object for which it is declared to be instituted. . . . " Gibbons v. Ogden*, 22 U.S. 1, 188 (1824) (emphasis added). Marshall's focus, plainly, is on the very purpose of the government the Constitution creates. He continues in that vein: "If . . . there should be serious doubts respecting the extent of any given power, it is a well settled rule, *that the objects for which it was given . . . should have great influence in the construction.*" Finally, to the same effect: "We know of no rule for construing the extent of such powers [as the commerce power], other than as is given by the language of the instrument which confers them, *taken in connexion with the purposes for which they were conferred.*" *Id.* at 188-189 (emphases added).

Clearly, Marshall thinks it important not simply to engage in textual analysis but to go behind the text for illumination – to inquire about the "objects" or "purposes" for which the Constitution's powers, and the Constitution itself, were instituted. Only so, he suggests, will we be able to reach a true "construction." Unfortunately, however, he never really engages in the larger, more complete inquiry he commends. Instead, he turns immediately to the text, focusing on the words "commerce" and "among." His initial concern is to show that "commerce" includes navigation, not mere "traffic" or the interchange of commodities. He is correct, of course, but in his effort to show that, the closest he comes to giving a functional account of the Commerce Clause is to say that

"[t]he power over commerce, including navigation, was one of the primary objects for which the people of America adopted their government. . . . " *Id.* at 190. That is true, and important, but it doesn't really amount to a functional account; for Marshall's use of "objects" here connotes more the *subject* of regulation than the *reason* for it. One wants to know not simply that the people of America adopted their government to give it power over commerce – important as that is – but *why* they wanted to give it power over commerce. What was their purpose in doing so? Without knowing that, we are left to focus on the meanings of "commerce" and "among," which are of limited value for understanding the commerce power – much less for restraining it, as history has shown.

Why then did the people of America want to give the federal government power over interstate commerce (which was indeed one of their primary reasons for adopting a new constitution)? The answer is well known, even if it is invoked in the Commerce Clause context today mostly in "dormant" or "negative" commerce clause cases. That "clause" is not really found in the Constitution, of course, yet the idea behind it is what led to the actual Commerce Clause. Under the Articles of Confederation, the weak national government was not only ill equipped to deal with foreign affairs, including commerce, but domestic affairs as well, especially commerce. In the name of local interests, states were erecting all manner of protectionist barriers to the free flow of commerce. As Madison put it in Federalist 42, "The defect of power in the existing confederacy, to regulate the commerce between its several members . . . ha[s] been clearly pointed out by experience." In Federalist 11, Hamilton remarked that the states had "fettered, interrupted and narrowed" commerce. Under the new plan, he continued, "[a]n unrestrained intercourse between the states themselves will advance the trade of each, . . . [and] [t]he veins of commerce in every part will be replenished

. . . from a free circulation of the commodities of every part." And Justice Johnson made the same observation in his concurrence in *Gibbons*, which Justice Stevens cited just two years ago: "If there was any one object riding over every other in the adoption of the constitution, it was to keep the commercial intercourse among the States free from all invidious and partial restraints." Cited by Stevens, J., *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 571 (1997) (citation omitted).

Under the Articles of Confederation, numerous calls had been made to address the problem. As early as 1781, for example, the Confederation Congress, without success, asked for "a right of superintending the commercial regulations of every state, that none may take place that shall be partial or contrary to the common interest. . . . " Jonathon Elliot, 1 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 92-93 (1901). Finally, in 1786 Virginia asked the states to send delegates to Annapolis to discuss "how far a uniform system in their commercial regulations may be necessary to their common interests and permanent harmony." *Id.* at 115. The Annapolis meeting in February of 1787 would lead to the convention in Philadelphia that summer, to the new Constitution, and to the Commerce Clause, which was meant to bring order out of chaos. It was meant to break the stranglehold of the states over commerce by vesting in Congress the power to regulate – or make regular – commerce among them. It was "an investment of power for the general advantage," as Marshall would later put it, *Gibbons* at 189, aimed at "harmony" among the states. (*See* Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 Mich. L. Rev. 1091 (1986): "There is much evidence that the main point of this grant (unlike the grant of power over foreign commerce) *was not to empower Congress, but rather to disable the states*. . . . The framers wanted commerce among the states to be free of

state-originated mercantilist impositions." *Id.* at 1125.) (emphasis added).

Thus, Marshall was quite right to be concerned that the federal government not be "crippled" and rendered "unequal to the object for which it is declared to be instituted." *Gibbons* at 188. That concern, however, should not be read, as some have, as a call for expansive government. That is not what Marshall said. On the contrary, the "object" for which the government was instituted, in this instance, was to *reduce* government – *state* government that interfered with free trade.[5] Indeed, Marshall's application of the Commerce Clause in *Gibbons* was precisely as intended by those who wrote the clause – to override a state measure that frustrated free commerce. That is the principal function of the clause. But that function also limits its scope. The Commerce Clause did not grant a power to regulate anything for any reason – provided only that Congress could show some connection with commerce. Rather, it had a relatively specific purpose – to enable the federal government to ensure the free flow of goods and services among the states.

There are several implications of this more complete, functional understanding of the Commerce Clause that need to be noticed. First, if the principal function of the clause is to enable the federal government to ensure free trade, the assumption is that commerce is a matter undertaken, for the most part, among private individuals and firms, not among governments – except insofar as they may be acting as market participants for their own relatively limited purposes. That implication is consistent

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[5] The parallels with section 5 of the Fourteenth Amendment are instructive. There too Congress is given power to "enforce," by appropriate legislation, the provisions of section 1 that prohibit states from abridging, depriving, or denying in the ways there listed. Congress's power is meant thus to *limit* (state) government.

with economic arrangements at the time the Constitution was written, with the recent war that had been fought in large part to cast off mercantilist restrictions on trade, and with the anti-mercantilist ideas of Adam Smith, whose *Wealth of Nations*, published in 1776, was taking hold in America at the time. Commerce, in short, is a private sector matter, with government enforcing the rules, not playing in the game. In particular, a functional understanding of the Commerce Clause does not envision Congress as authorized to engage in the kind of central economic planning, much less social engineering, that many nations around the world pursue, which would amount to the antithesis of free economic arrangements.

Second, if commerce is mostly a private sector matter, with government enforcing the rules, there is no reason to suppose that government must make the rules – much less that the federal government should do so. Under our common law system, most of the rules of commerce began as informal customs or conventions. They evolved over centuries and have simply been "recognized," and sometimes modified, by courts and legislatures as the need arose. *See* F. Hayek, 1 *Law, Legislation, and Liberty* 72-93 (1973). Under our system of limited government, therefore, there is a strong presumption that people can regulate their own affairs, and that government is necessary only when that presumption fails, leading to a case or controversy that is brought before a court. Moreover, only when enough such controversies indicate a larger problem do legislatures ordinarily step in to modify a rule, and then only to the extent necessary to address the problem. Thus, until very recently, at least, courts have played the larger role in shaping the rules of commerce. But just as there is a presumption in favor of private regulation of commerce (and much else besides), and a presumption in favor of courts over legislatures, so too

there is a presumption in favor of state courts and legislatures over federal institutions. There is no reason to suppose, that is, that in most cases state courts and legislatures, being closer to most problems, are not perfectly able to fashion those rules of commerce they may need to fashion as problems arise – especially since they can take local circumstances into account as they do so.

Third, the fact that Congress *was* given the power to regulate commerce among the states suggests that there was in fact a problem that states were unable to handle. But the very language of the Commerce Clause – pertaining to commerce *among* the states – suggests also the extent or limit of the problem. Thus, given the presumptions just noted, the commerce power was hardly meant to be plenary. Rather, it was meant to be limited to the problem that gave rise to it, with due deference to private and state regulation where any particular problem proved insufficient to warrant congressional action. The Necessary and Proper Clause, read not simply as authorizing means to Congress but as limiting those means to such as are both necessary and proper, is a constitutional recognition of our system's presumptions. In sum, Congress has the power to address the problem of impediments to interstate commerce. The power arises, however, only if there is such a problem; and it extends only to that problem. It is not a free-ranging power, untethered to the kinds of problems that brought it into being.

Finally, although the problem that gave rise to the commerce power limits its scope, there is more than one way the power may operate within that scope. In its "dormant" mode, for example, the commerce power acts simply as a negative – to preempt state measures that interfere with free trade among the states. If it had wanted to, Congress could have legislated affirmatively to accomplish the same end. Instead, courts secure that end simply by reading the clause functionally, in effect. In

a case like *Gibbons*, however, an affirmative federal licensing scheme accomplished that end. There, Congress had simply secured the right to trade of those who met the minimum requirements set by the scheme, as a result of which the inconsistent state statute had to fall. But there may be occasions when more substantial affirmative regulation is needed. After all, many if not most of the rules of commerce noted above, whether crafted privately or by public institutions, clarify and secure the rights and obligations of parties engaged in commerce. Accordingly, courts and legislatures called upon to enforce or craft such rules are engaged in classic police power functions: they are securing rights regarding property, liberty, and contract. Insofar as it may be necessary for Congress to exercise its commerce power, therefore, it may be necessary for it to engage in such police power functions too. That is not to say, however, that Congress has a *general* police power under the Commerce Clause. Rather, such police power as is entailed by the Commerce Clause is incidental, and bounded by the function of the clause – to secure the free flow of commerce, primarily against state interference, but also against structural impediments that states, alone or together, may be unable to address.

In its affirmative mode, therefore, the commerce power is twice limited. The police power that is entailed by the affirmative commerce power is limited, as just noted, by the function of the parent commerce power; that function limits the commerce power to situations that make its use necessary. But the entailed police power is restrained in addition by the same restraints that apply to the general police power. In its most fundamental conception, the police power, as Locke observed, is the "Executive Power" that each of us has in the state of nature to secure his rights, which we yield up to government when we constitute ourselves as a people. J. Locke, *Second Treatise of Government* ¶ 13 (1690). Thus, it is bounded by the rights we have to be secured. We cannot

use it to accomplish other ends. We cannot condemn private property for public use under the police power, for example; that has to be done under the eminent domain power. The police power is for securing rights – here, the rights of commerce, where states are interfering with them, or where states may be unable themselves to secure them, which would make it both necessary and proper to employ the police power the Commerce Clause entails for the limited purpose of ensuring the free flow of commerce, as authorized under the Commerce Clause.

Madison was right, therefore, when he wrote, late in life, that the domestic commerce power "was intended as a negative and preventive provision against injustice among the States themselves, rather than as a power to be used for the positive purposes of the General Government . . . " (3 M. Farrand, *The Records of the Federal Convention* 478 (1911) (reprinting a letter from Madison to J. Cabell, Feb. 13, 1829)). That comment, however, has often been misunderstood. The commerce power was indeed intended as a "preventive provision against injustice among the states." And it was not meant "to be used for the positive purposes of the General Government" – certainly not as it is used today. But the "negative and preventive" use of the power refers to the *purpose* of the power, not to the character of the means employed under it. Congress can certainly take affirmative action under the clause – as it did in *Gibbons* – for the "negative" purpose of preventing restraints on commerce. That is a far cry, however, from using the power to pursue all manner of "positive" purposes – or public policies – unrelated to freeing the flow of commerce among the states.

As noted above, however, the commerce power is bounded as well by the need to legislate in the first place. Thus, under a functional account, if there is no problem pertaining to the free flow of commerce, no legislation is authorized. Indeed, if there is no such problem, and the

rights of commerce are secure, any legislation would be beyond the scope of the commerce power and might even be aimed at securing the kinds of protectionist and redistributive ends the Commerce Clause was written to foreclose. In that case, not only would such legislation not be necessary as a means of securing the purposes of the Commerce Clause, but in undermining those very purposes it would not be proper either. The Commerce Clause was written to limit government's role in the marketplace, not to expand it. It was written to enable the federal government to play the role, essentially, of a policeman. It was written and meant to free commerce, not to hobble it. Properly understood and applied, it serves a crucial function in a Constitution designed to limit government and free commerce.

II. EVEN AS UNDERSTOOD TODAY, THE COMMERCE CLAUSE DOES NOT AUTHORIZE CONGRESS TO PROHIBIT THE ARSON OF A PRIVATE RESIDENCE.

Although Marshall never developed the more complete, functional account he commended in *Gibbons*, the result he reached there, on narrower grounds, was not only right but consistent with a more complete account. At the same time, the narrower, textual approach he took has colored our understanding ever since, with all but predictable results. Thus, his focus on the meaning of "commerce" enabled courts for some time to prohibit Congress from regulating manufacturing, mining, agriculture, and other activities that are not commerce but are closely related to it; that distinction eventually broke down, however, as courts allowed regulation not only of those but of more remote activities that still "affected" commerce. And his focus on the meaning and application of "among" has also led to the effects test as Congress has increasingly regulated intrastate commerce and other activities that "affect" interstate commerce. As a result,

Congress has used its commerce power to regulate more and more of life, often in ways that do not deal with commerce at all (this arson case, for example), or in ways that not only do not free commerce but actually hobble it.

The great watershed in Commerce Clause jurisprudence came during the New Deal, of course, with President Roosevelt's notorious Court-packing scheme. Prior to that time the Marshall approach held the line, for the most part, against efforts by Congress to expand its regulatory power under the Commerce Clause. A host of "progressive" ideas came together during the New Deal, however, including notions of majoritarian democracy and judicial restraint, in the face of which the narrow, textual account fell apart. There followed a vast expansion of Congress's regulatory power under the Commerce Clause, primarily under the effects test. Nevertheless, even today, and especially after the Court put a brake on the expansion of the commerce power in *Lopez*, Congress does not have the power to prohibit the arson of a private residence.

Chief Justice Rehnquist's review in *Lopez* of Commerce Clause history and his discussion of modern Commerce Clause doctrine are sufficient to show why Congress has no such power. As he notes, although the New Deal cases "ushered in an era of Commerce Clause jurisprudence that greatly expanded the previously defined authority of Congress under the Clause," even those cases confirm "that this power is subject to outer limits." *Lopez*, at 556-557. Concerned, in particular, not to create "a completely centralized government" (*NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)), the modern Court undertook to decide, he argues, "whether a rational basis existed for concluding that a regulated activity sufficiently affected interstate commerce." *Lopez*, at 557. Consistent with that structure, the Court has identified "three broad categories of activity that Congress may regulate under its commerce power:" the "channels

of interstate commerce;" the "instrumentalities of interstate commerce, or persons or things in interstate commerce;" and "those activities having a substantial relation to interstate commerce, *i.e.*, those things that substantially affect interstate commerce." *Id.* at 558-559 (citations omitted). Rehnquist admits that the Court's case law "has not been clear whether an activity must 'affect' or 'substantially affect' interstate commerce" to come under the commerce power; but he concludes, consistent with the "great weight" of the Court's case law, "that the proper test requires an analysis of whether the regulated activity 'substantially affects' interstate commerce." *Id.* at 559.

Rehnquist then turns to the question before the Court in *Lopez*, whether the Commerce Clause authorized Congress to enact section 922(q) of the Gun-Free School Zones Act, which banned the possession of a gun near a school. Quickly disposing of the first two categories as not relevant to the question, he concludes that if section 922(q) were to be sustained, it would be because the prohibited act substantially affected interstate commerce. But section 922(q), he notes, "is a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic activity, however broadly one might define those terms." *Id.* at 561. And later in the opinion he adds, to the same effect: "The possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce." *Id.* at 567.

In the statute before the Court, section 844(i), which prohibits arson, is in all relevant respects identical to section 922(q), except that section 844(i) contains a jurisdictional element, meant to "ensure, through case-by-case inquiry, that the [arson] in question affects interstate commerce." *Id.* at 561. Given that element, it falls to the government to show, in this case, that the arson was of a property "used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce,"

much as it fell to the government in *Lopez* to show generally that gun possession near a school affected interstate commerce.

In this case, the government introduced no evidence to show that the Walker home was "used in interstate or foreign commerce" – at least as that concept is ordinarily understood. The home was used as a residence, not as a business. If to reside is to use one's residence in interstate commerce, it is hard to imagine any activity or any thing that cannot be reached by the commerce power. But neither was the home "used in an activity affecting interstate or foreign commerce" – the only leg of the jurisdictional element that would seem to apply here – unless we are prepared to say that *every* activity affects interstate or foreign commerce, which at some level, of course, is true. It is at this point that the government piles "inference upon inference" – the out-of-state mortgage, the out-of-state insurer, the receipt of gas produced outside the state – to try to show that the home is used in an activity that affects interstate commerce. But again, that amounts to saying nothing more than that residing, which in the modern world involves those connections, affects interstate commerce, which is true, once again, but trivially so. And this Court has never declared that "Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities." *Id.* at 559 (quoting *Maryland v. Wirtz*, 392 U.S. 183, 196, n. 27). Indeed, were the government to prevail with its argument, we could imagine two arsons, one involving a home like the Walkers', the other involving a home with in-state insurance, solar heat, and no mortgage. The first arson would be a federal crime. The second would not. Those are the kinds of absurdities one finds down this road. And the issue here is hardly novel. Indeed, in 1800, confronting a bill to federally charter a copper mining company, Jefferson saw that such an interpretive method,

used with the Necessary and Proper Clause, would destroy the idea of a limited federal government: "Congress [is] authorized to defend the nation. Ships are necessary for defense; copper is necessary for ships; mines necessary for copper; a company necessary to work the mines; and who can doubt this reasoning who has ever played 'This is the House that Jack Built?' " (Quoted in C. Warren, *The Supreme Court in United States History* 501 (1922)).

Thus, whether Congress tries to draw the connection through findings, as in *Lopez* (where no such findings were ever made), or the Court tries to draw it in a case like this (where a jurisdictional element is involved), the issues are the same. Chief Justice Rehnquist put it plainly in *Lopez* when he said that "[s]ection 922(q) is a criminal statute that by its terms has nothing to do with commerce. . . . " *Lopez* at 561. Section 844(i) is a criminal statute that by its terms tries to pass as a regulation of interstate commerce. It will not work. This is not a regulation of commerce. It is an ordinary, garden variety police power statute, dressed up as a regulation of commerce.

But what about the "class of activities" approach the government advances in its Brief at the petition stage? Even if the connection with interstate commerce may be slight in a given case, the government argues, citing this Court's decision in *McLain v. Real Estate Board of New Orleans, Inc.*, 444 U.S. 232 (1980), "[t]he congressional power to regulate the class of activities that constitute the rental market for real estate includes the power to regulate individual activity within the class." Brief at the petition stage, 5 (citing *McLain* at 245). Moreover, the government continues, "considered in the aggregate," residential arsons "have a substantial effect on interstate commerce" (citing FBI statistics about the total costs of residential arsons). *Id.* at 6. Thus, "[b]y including a jurisdictional element in Section 844(i), Congress defined a

category of arson offenses that are connected to interstate commerce, and that accordingly may be considered as a class to establish a substantial effect under *Lopez*." *Id.* at 6-7. Finally, citing a recent Eleventh Circuit opinion, the government argues that " '*Lopez* does not require a substantial effect on interstate commerce to result from each individual criminal act,' but only that the relevant class of activity – 'arson of property used in commerce or used in an activity affecting commerce' – exert a substantial effect." *Id.* at 8 (citing *United States v. Dascenzo*, 152 F.3d 1300, 1303, n. 6 (11th Cir. 1998)). (The court below takes a similar "class of activities" approach in this case.)

That argument is patently circular. Indeed, the "class of activities" approach, together with its aggregation method, proves everything and therefore nothing. Start with the statute: it criminalizes, in relevant part, the arson of "any building . . . used in . . . any activity affecting interstate or foreign commerce. . . . " Read naturally, that means that the statute applies *only if* the building in question is used in an activity affecting interstate or foreign commerce. If the government cannot prove that for *this* building, the statute does not apply. But the fact that the statute speaks of buildings thus used implies that there is a class of buildings *not* thus used – otherwise there would be no point in singling out this class. If that is so, then aggregating those "non-affect" arsons will still not produce arsons that, even in the aggregate, affect interstate commerce. No matter how many zeros you aggregate, the sum is still zero. But if the effect on interstate commerce of the arson of *this* building is in fact not zero, but still trivial, then aggregating all such arsons in order to satisfy the substantial effects test of *Lopez* amounts to an end run around *Lopez*. For if even the most trivial effects, when aggregated, constitute a substantial effect, then it follows, since no act is without

some effect, that there is no class of buildings not in interstate commerce, and the whole point of the substantial effects test – to distinguish proper from improper applications of the Commerce Clause – is undermined. Finally, the government claims that the power to regulate a "class of activities" includes the power to regulate individual activities within the class. True, but that begs the question by assuming that the regulated activity is within the class – precisely the point that has to be proven. If the Walker home is not *itself* used (non-trivially) in an activity affecting interstate commerce, it is not within the class; and any effort to bring it within the class by aggregating arsons of all such properties in order to meet the *Lopez* substantial effects test is bootstrapping, plain and simple.

The deeper problem with this approach, however, was pointed to by Justice Thomas in his discussion in *Lopez* of the "class of activities" approach. *Lopez* at 600-602. The problem is with the "substantial effects" test itself. As Thomas wrote early in his concurrence, "The Commerce Clause does not state that Congress may 'regulate matters that substantially affect commerce . . . ;' " indeed, he continued "the Framers could have drafted a Constitution that contained a 'substantially affects interstate commerce' clause had that been their objective." *Id.* at 587-588 (Thomas, J., concurring). They did not. They drafted a constitution that gave Congress the power to regulate – or make regular – commerce among the states. Understood in that basic, functional way, Congress has the power to take such measures as may be necessary or proper to ensure the free flow of commerce among the states. It does not have the power to prohibit actions that in no way impede such commerce or, if they do, are already addressed by the states.

The Court's "substantial effects" test is simply not suited to addressing the issue in that kind of principled way. But for that matter, neither are the "channels" or "instrumentalities" legs of the modern Commerce Clause triad suited to the task. They address the "objects" of regulation rather than the *object* or *purpose* of regulation. Indeed, just as the Founders did not write that Congress may regulate matters that substantially affect commerce, so too they did not write that Congress may regulate the channels and instrumentalities of commerce. Their simple statement – that Congress shall have the power "to regulate Commerce . . . among the several States" – keeps the focus on "regulate" as much as on "commerce" and "among." When the focus shifts to the *objects* of regulation, the question – "Regulation to what end?" – gets lost. When that happens, it is hard to stop the expansion because the point of having the power in the first place has been lost.

With *Lopez*, the Court finally drew a line in the sand. But its argument took the form of what might be called a "limited" *reductio ad absurdum*. The Court said, in effect, that the government's conclusion, arguably drawn from the Court's Commerce Clause jurisprudence, contradicts the basic premises of the Constitution and so cannot stand. Rather than look searchingly at its underlying jurisprudence, however, the Court limited itself to saying that *this* conclusion or implication does not follow. That is a limited, essentially defensive response. It does not go to the heart of the matter. It retains, as an affirmative theory of the Commerce Clause, the "triad" that approximates the Court's record over the years. At this time, perhaps the Court is not prepared, for practical reasons, to grasp the nettle. In time, however, if the Court is going to extricate itself, and the nation, from the untenable implications of that record, it will need to set forth an

affirmative theory of the Commerce Clause that is grounded in those principles.

We all know what is going on in this case. This is just one more in a long series of federal criminal statutes that Congress has enacted to "look tough on crime," oblivious to any constitutional restraints on its power or any implications for state and federal courts. The effects test that has brought us to this juncture flows from a substantial misreading of the Commerce Clause. It needs to be addressed in a serious way because it is fundamentally inconsistent with our first principles as a nation.

CONCLUSION

This case, involving the simple matter of residential arson, raises profoundly important constitutional questions concerning the division of powers between the federal and state governments and the limits of federal power. The Constitution created a system of dual sovereignty and limited federal government. The Commerce Clause was meant to serve that plan by enabling Congress to ensure the free flow of commerce among the states. When the clause is read with that purpose in mind, it serves a crucial function in our system of limited government and individual liberty. When it is read to enable Congress to regulate all manner of activities far removed from that end, it is fundamentally misread. If our system of dual sovereignty and limited government is to endure, the Court must exercise the authority it has to secure the nation's first principles. Nearly two centuries ago, Chief Justice Marshall stated well the central issue in this case: "To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained." *Marbury v. Madison*, 5 U.S. 137, 176 (1803). Congress having no power to enact the statute at issue in

this case, the decision of the court below should be reversed.

Respectfully submitted,

*Ronald D. Rotunda
504 East Pennsylvania Avenue
Champaign, IL 61820
(217) 333-3459

Cato Institute
Roger Pilon
Timothy Lynch
Robert A. Levy
1000 Massachusetts, Avenue, N.W.
Washington, D.C. 20001
(202) 842-0200

*Counsel of Record

(14)

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In The

Supreme Court of The United States

DEWEY JONES,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Seventh Circuit

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND ASSOCIATION OF FEDERAL DEFENDERS AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

Of Counsel:

BARBARA BERGMAN
University of New Mexico
School of Law
1117 Stanford, NE
Albuquerque, NM 87131
505/277-3304

*JEFFREY J. POKORAK,
Acting Director,
Clinical Programs
St. Mary's University,
School of Law
2507 N.W. 36th Street
San Antonio, TX 78228
210/431-5729

Counsel For Amici Curiae
Member, Supreme Court Bar
Counsel of Record

Questions Presented

Whether, in light of *United States v. Lopez*, 514 US 549 (1995), and the interpretive rule that constitutionally doubtful constructions should be avoided, see *Debartolo Corp. v. Florida Coast Trade Council*, 485 US 568, 575 (1988), section 844 (i) applies to the arson of a private residence; and if so, whether its application to the private residence in the present case is constitutional.

TABLE OF CONTENTS

QUESTIONS PRESENTED..... i

TABLE OF AUTHORITIES iii

INTEREST OF AMICI CURIAE..... 1

STATEMENT OF THE CASE..... 2

SUMMARY OF ARGUMENT..... 5

ARGUMENT..... 8

I

THE FUNDAMENTALS OF THE DUAL SOVEREIGNTY SYSTEM REQUIRE THIS COURT TO CHECK EXECUTIVE PROSECUTORIAL OVERREACHING WHICH THREATENS TO ALTER THE BALANCE BETWEEN THE STATE AND FEDERAL GOVERNMENTS..... 8

II

IN PROSECUTING CASES IN WHICH CONGRESS HAS DETERMINED THAT THE AFFECT ON INTERSTATE COMMERCE IS AN ELEMENT OF THE OFFENSE, THE GOVERNMENT MUST PROVE THAT SUCH EFFECT OF THE CHARGED ACT WAS "SUBSTANTIAL."..... 14

CONCLUSION..... 25

TABLE OF AUTHORITIES

CASES

AFL-CIO v. Local 334, 452 U.S. 615 (1981)..... 21

Allied-Bruce Terminix Co. Inc. v. Dobson, 513 U.S. 265 (1995)..... 20

Brecht v. Abrahamson, 507 U.S. 619 (1993)..... 5, 10

Caron v. United States, 524 U.S. 308 (1998)..... 21

Coleman v. Thompson, 501 U.S. 722 (1991) 8

Engle v. Isaac, 456 U.S. 107 (1982)..... 5, 10

Evans v. United States, 504 U.S. 255 (1992)..... 20

Gregory v. Ashcroft, 501 U.S. 452 (1991)..... 10, 12

Gulf Oil Corp. v. Copp Paving Co. Inc., 419 U.S. 186 (1974)..... 20

Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964)..... 17

Huddleston v. United States, 415 U.S. 814 (1974)..... 18

INS v. Chadha, 462 U.S. 919 (1973)..... 14

Katzenbach v. McClung, 379 U.S. 294 (1964)..... 17

Maryland v. Wirtz, 392 U.S. 183 (1968) 17

NLRB v. Jones & Laughlin Steel, 301 U.S. 1 (1937) 9

Perez v. United States, 402 U.S. 146 (1971)..... 9, 18

Scarborough v. United States, 431 U.S. 563 (1977)..... 21

Sedima, S.P.R.L. v. Imrex Co. Inc., 473 U.S. 479 (1985)..... 21

Sugarman v. Dougall, 413 U.S. 634 (1973)..... 10

United States v. Bass, 404 U.S. 336 (1971)..... 13

United States v. Culbert, 435 U.S. 371 (1978)..... 21

TABLE OF AUTHORITIES -- Continued

United States v. Darby, 312 U.S. 100 (1941)..... 15
United States v. Denalli, 73 F.3d. 328 (11th Cir. 1996)..... 23
United States v. Gomez, 87 F.3d 293 (9th Cir. 1996)..... 23
United States v. Hickman, 179 F.3d 230 (5th Cir., 1999)(en banc)..... 20
United States v. Jones, 178 F.3d 479 (7th Cir. 1999) ..... *passim*
United States v. Lopez, 514 U. S. 549 (1995)..... *passim*
United States v. McGuire, 178 F.3d. 203 (3rd Cir. 1999)..... 24
United States v. Pappadopolous, 64 F. 3d. 522 (9th Cir. 1995)..... 23
U.S. Bulk Carriers Inc. v. Arguelles, 400 U.S. 351 (1971)..... 20
Wickard v. Filburn, 317 U.S. 111 (1914)..... 16

CONSTITUTIONAL PROVISIONS

U.S. CONST., art. I, §8 12
U.S. CONST., art. II, §4 12
U.S. CONST., art. III, §2..... 12
U.S. CONST., art. III, §3 12
U.S. CONST., amend. X 10

STATUTORY PROVISIONS

18 U.S.C. §844(i)..... *passim*
18 U.S.C. §922(a)(6)..... 19
18 U.S.C. §922(d)(1)..... 19

TABLE OF AUTHORITIES -- Continued

18 U.S.C. §924(c) 2
18 U.S.C. §1951..... 20, 21
26 U.S.C. §5861(f) 3

MISCELLANEOUS

The Federalist Papers, No. 17..... 11
The Federalist Papers, No. 45..... 11
The Federalist Papers, No. 73 14
Brief for the United States on Petition for Certiorari (No. 99-5739) 3
Memorandum of Decision and Order, *United States v. Jones*, No. 1:98-CR-16 (June 23, 1998) 3
S. Rep. No. 95-605, 95th Cong., 1st Sess. 29 (1977) 13

INTEREST OF AMICI CURIAE[1]

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit organization whose members represent persons accused of crime. One of the missions of NACDL is to ensure justice and due process for persons so accused. NACDL has a membership of over 10,000 and an additional 28,000 affiliate members in all fifty States. NACDL is the only national bar association devoted exclusively to the concerns of criminal defense lawyers.

The Association of Federal Defenders (AFD) was formed in 1995 to enhance the representation provided under the Criminal Justice Act, 18 U.S.C. § 3006A, and the Sixth Amendment to the United States Constitution. The Association is a nation-wide, non-profit, volunteer organization whose membership includes attorneys and support staff of Federal Defender Offices. One of AFD's missions is to file amicus curiae briefs to ensure that the position of indigent defendants in the criminal justice system is adequately represented.

Amici believe that, in deciding this case, the Court will necessarily address a question of substantial importance in federal criminal practice: whether predominately intrastate acts,

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[1] In accordance with Supreme Court Rule 37.6, undersigned counsel certifies that no counsel for any party authored, in whole or in part, any aspect of this brief. Further, no person or entity, other than amici curiae, made a monetary contribution to the preparation or submission of this brief.

which have no substantial effect on interstate commerce, may be regulated and criminally punished by the federal government. The answer to this question will implicate how federal crimes are charged by the executive branch, how they are submitted to a jury by trial courts and how judges will, in future cases, review jury determinations of jurisdictional elements. Therefore, the Court's action in this case will affect what charges a citizen may face in the federal courts. For that reason, NACDL and AFD seek to address the interests of defendants who may not be situated precisely as the petitioner in this case, but who are affected by the Court's resolution of this issue. NACDL and AFD believe they are in a unique position to assist the Court in examining the important constitutional questions raised by this case.[2]

STATEMENT OF THE CASE

Petitioner Dewey Jones, after a dispute with his cousin James Walker, tossed a Molotov cocktail into the living room of Walker's Fort Wayne, Indiana, residence. *See United States v. Jones*, 178 F.3d 479 (7th Cir. 1999). A federal grand jury returned a three-count indictment charging Jones with arson, a violation

[2] Amici have obtained consent to the filing of this consolidated brief in support of the petitioner from all interested parties. These letters of consent have been filed separately with the Clerk of this Court.

of 18 U.S.C. § 844(i), as well as violations of 18 U.S.C. § 924(c) (using a destructive device during and in relation to a crime of violence) and 26 U.S.C. § 5861(f) (making an illegal destructive device). *See id.* Only Mr. Jones' arson conviction is at issue in this appeal.

The federal arson statute, 18 U.S.C §844(i), includes a jurisdictional element that the property implicated in the act of arson was used in or affected interstate commerce. It is undisputed that the Walkers' residence was a private residence, not used for any business purpose. See Brief for the United States on Petition for Certiorari at 2, *United States v. Jones*, (No. 99-5739). To satisfy the jurisdictional element of the charge, the government argued three connections between the house and interstate commerce: The mortgage on the property held by an out-of-state company; the house's connection to a natural gas supply that is federally regulated; and the insurance on the house which implicates a federally regulated industry. *See Jones*, 178 F.3d at 480.

The Seventh Circuit found that the "interstate connections are pretty slight for a single building; [and] they don't establish a 'substantial' connection between this arson (or this residence) and interstate commerce." *Id.*[3] However, the Seventh Circuit

[3] It is questionable at best whether the arson had even the slightest effect on any of these interstate activities. An out-of-state mortgage company held the mortgage on the Walkers'

(continued...)

affirmed the jury's conviction, holding that this Court's opinion in *United States v. Lopez*, 514 U.S. 549 (1995), required the government to prove no more than a "small effect" on interstate commerce. *See Jones*, 178 F.3d at 480. In reaching this conclusion, the Seventh Circuit analyzed Jones' arson not as an independent act, but rather speculated on the effect of all such acts in aggregation, in order to determine whether the interstate contact was substantial. *See id.* The court below reasoned that, although the interstate impact of this particular act was slight, because the crime might in some small way touch the residential housing industry, goods and materials for housing, gas, electricity, insurance markets and loan companies the crime was

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[3](...continued)
house, however a witness from the mortgage company testified that the company suffered no loss as a result of the fire. See Memorandum of Decision and Order, *United States v. Jones*, Northern District of Indiana, No. 1:98-CR-16, June 23, 1998. Natural gas was supplied to the Walker residence by the Northern Indiana Public Service Company, which received its gas from outside the state. There was no evidence, however, that the supply of natural gas to the Walker residence was interrupted as a result of the fire. *See Jones*, 178 F.3d at 480. Finally, a company with an out-of-state headquarters, which paid the Walkers' insurance claim with a draft from an out-of-state bank, insured the Walker residence. The insurer had about 20 employee agents in Fort Wayne, however, and an employee claims adjuster who had authority to settle claims only in Fort Wayne settled the Walkers' insurance claim. *See id.*

considered to have "national if not international scope." *Id.* The court went on to hold that arson has the *potential* to substantially affect each of these industries and concluded that the jurisdictional element requires proof only of some effect on interstate commerce as "the sum of many small effects can be a large effect." *Id.*[4]

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SUMMARY OF ARGUMENT

When Congress enacts a statute, as in the instant case, which contains a jurisdictional element that the act "affects interstate commerce," the executive must prove that the specific acts underlying the crime substantially affected interstate commerce. Such proof must relate to the specific acts alleged, and not be determined by a court's post-hoc aggregation analysis.

"The States possess primary authority for defining and enforcing the criminal law." *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993) (quoting *Engle v. Isaac*, 456 U.S. 107, 128 (1982)). Although the federal government's power to regulate the

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[4] In order to reach this conclusion, the court of appeals also relied upon an aggregation study conducted by the Federal Bureau of Investigation which reported a loss of approximately $280 million in 1997 due to residential arson. *See Jones*, 178 F.3d at 480. The court of appeals went on to note the effect such activity has, in the aggregate, on insurance markets, utilities, hotels, and the travel and commerce of friends and loved ones of arson victims. *See id.*

conduct of its citizens is great, it is not unlimited. Even under the Commerce Clause, which provides the federal government with its broadest regulatory power, this Court has recognized limits on the power to enact criminal statutes. In *United States v. Lopez*, 514 U.S. 549 (1995), this Court identified three limited categories of activity that Congress may regulate under its commerce power: channels of interstate commerce, instrumentalities of interstate commerce, and activities having a substantial relation to interstate commerce. *See id.* at 558.

Congress enjoys two ways of regulating seemingly local acts under its Commerce Clause power: legislative general findings and the inclusion in legislation of a specific jurisdictional element. In the case of general findings, the federal courts should give great deference to the findings of Congress and employ an aggregation analysis. However, when Congress enacts a statute which includes a specific jurisdictional element, federal courts should not employ an aggregation analysis. Rather, courts must require proof that the specific acts prosecuted have a substantial effect on interstate commerce. The instant case is an elements case which requires the application of a strict "substantial effects" test to the specific acts alleged as a violation of a federal sovereign interest.

The Seventh Circuit Court of Appeals, in the instant case, incorrectly applied aggregation analysis, holding that the "collective effect" of local acts of arson on interstate commerce is substantial. *See United States v. Jones*, 178 F.3d 479, 481 (7th

Cir. 1991). The lower court disregarded as constitutionally meaningless the local arson's trivial connection with interstate commerce. To the contrary, it reasoned that the combined effect of all arsons of residential property committed in this country have sufficient effect on the interstate natural gas and the insurance industries to qualify as "substantial." The application of this analysis is misplaced as the result would be that any time Congress required a jurisdictional element, the executive (and the courts) would be left free to read the element wholly out of the statute. The effect of such analysis would be to supply the federal executive with unlimited discretionary power to prosecute any action, regardless of its connection to commerce.

In order to maintain the fundamental division of sovereign power between the States and federal government, this Court must stand ready to check any attempt by the federal legislature or executive to possess or exercise the power to indiscriminately prosecute wholly local activity. In the instant case, this Court should overturn the court below and prevent the federal executive from creating and employing a general police power.

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ARGUMENT

I

THE FUNDAMENTALS OF THE DUAL SOVEREIGNTY SYSTEM REQUIRE THIS COURT TO CHECK EXECUTIVE PROSECUTORIAL OVERREACHING WHICH THREATENS TO ALTER THE BALANCE BETWEEN THE STATE AND FEDERAL GOVERNMENTS.

"This is a case about federalism. It concerns the respect that federal courts owe the States...." *Coleman v. Thompson*, 501 US 722, 726 (1991). Indeed, it is this Court which is placed in the constitutional role of assuring that neither the federal legislative branch nor the federal executive exercises general police power to prosecute primarily local conduct. As in all such cases, this Court must "start with first principles." *United States v. Lopez*, 514 U.S. 549, 552 (1995). In the instant case, as in *Lopez*, "first principles" require this Court to reassert, and require adherence to, the limited powers of the executive to prosecute crimes which are of an essentially intrastate nature. By prosecuting a non-commercial arson of a private home, the executive breached its limited powers.

In *Lopez*, this Court identified three categories of activity that Congress may regulate, and the executive may enforce, under the commerce power: channels, instrumentalities, and activities having a substantial relation to interstate commerce. *See id.* at 558. There is no dispute that it is the last category -- substantial relation -- that is before the Court. In *Lopez*, this Court found

that the Commerce Clause authority has always been limited to "the power to regulate those activities [which] have a *substantial* relation to interstate commerce." *Lopez*, 514 U.S. at 558-59 (citing *NLRB v. Jones & Laughlin Steel*, 301 U.S. 1, 37 (1937)) (emphasis added).[5] Indeed, what this Court accomplished in *Lopez* was not the rewriting -- but the righting -- of the constitutional balance between sovereigns in criminal law jurisdiction. This case raises the questions of where the far edge of this constitutional balance rests, and whether in enforcing 18 U.S.C. § 844(i) the executive has gone over that edge. Amici

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[5] Mr. Justice Stewart presaged this issue, arguing that, under the Commerce Clause, Congress has the power to enact criminal laws only to prohibit or regulate those intrastate activities that have a demonstrably substantial effect on interstate commerce. Indeed, what Justice Stewart said of loan sharking is absolutely applicable to the arson statute at issue in the instant case: "In order to sustain this law we would, in my view, have to be able at the least to say that Congress could rationally have concluded that [arson] is an activity with interstate attributes that distinguish it in some substantial respect from other local crime. But it is not enough to say that [arson] is a national problem, for all crime is a national problem. It is not enough to say that some [arson] has interstate characteristics, for any crime may have an interstate setting.... I cannot escape the conclusion that this statute was beyond the power of Congress to enact." *Perez v. United States*, 402 U.S. 146, 157 (1971)(Stewart, J., dissenting). *Perez*, however, was a findings case, not an elements case. See, Part II, *infra*.

believe that the executive branch has ignored the very inherent limits of federalism that the executive is bound to enforce.

A. Criminal Law is Primarily the Province of the States.

The definition and prosecution of local, intrastate crime is reserved to the States under the Tenth Amendment to the Constitution.[6] The Framers of the Constitution certainly did not intend for the general government to possess the power to prosecute wholly local activity. "The States possess primary authority for defining and enforcing the criminal law." *Brecht v. Abrahamson,* 507 U.S. 619, 635 (1993) (quoting *Engle v. Isaac,* 456 U.S. 107, 128 (1982)). State autonomy and the power of "formation, execution, or review of broad public policy... go to the heart of representative government." *Gregory v. Ashcroft,* 501 U.S. 452, 462 (1991) (quoting *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973)). This direct and primary political accountability reserved for the States would become illusory, however, "[w]ere the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities." *Lopez,* 514 U.S. at 577 (Kennedy, J., concurring).

Where the Constitution mandates an appropriate balance

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[6] U.S. CONST. amend. X: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

between state and federal jurisdictional powers, expansive Congressional legislation or overreaching executive prosecutions threatens that balance.

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.... The powers reserved to the several States will extend to all objects which, in the ordinary course of affairs, concerns lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.

The Federalist Papers, No.45. In our system of dual-sovereignty, the State's primary interest in criminal justice helps ensure that citizens feel close allegiance to their State of residence.[7]

> There is one transcendent advantage belonging to the province of State governments...I mean the ordinary administration of criminal and civil justice. This, of all others, is the most powerful, most universal, and most attractive source of popular obedience and attachment.

The Federalist Papers, No. 17. For the federal sovereign to appropriate this power in an absolute fashion would certainly upset this "most attractive source of popular obedience."

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[7] Such allegiance is created by just implementation of the laws, both public and private, to the disputes of each State's citizens. Empowering the citizens' representatives -- be they legislative or executive -- to blur the lines of responsibility does not benefit the electorate. Rather, it introduces uncertainty in otherwise natural allegiances, denigrates the very concept of Statehood, and dissipates the democratic process.

B. Federal Prosecution Power Is Not General or Unlimited.

This Court has recognized that the structure of federalism undergirds all governmental power in this country -- be it vested in the individual, State, federal executive, federal legislature, or federal judiciary. It is that balance between the State and federal government that protects the individual from oppression. "A healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Lopez*, 514 U.S. at 551 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)). This Court has concluded that this balance includes the broad, but not unlimited, power of the federal government to prosecute or punish conduct as criminal. *See id.*

The federal sovereign enjoys wide latitude in the criminal regulation of matters which primarily impact federal or interstate concerns. Some areas of criminal regulation are enumerated by the Constitution. These are counterfeiting, piracies and felonies committed on the high seas, treason against the United States, impeachment and offenses against the Law of Nations. *See* U.S. CONST. art. I, §8, cl. 6,10; art. II, §4; art. III, §3, cl. 1. All other federal crimes are congressional creations, legislated under the enumerated powers in the Constitution, such as the Commerce Clause, the Necessary and Proper Clause, or the War Powers Clause. *See* U.S. CONST., art. III, §2, cl. 1 (providing "[t]he judicial power shall extend to all Cases . . . arising under this

Constitution...").

Congress often invokes the specific grant of power found in the Commerce Clause to federalize criminal activities. The commerce power is, however, a limited power, subject to judicial review. The judiciary will limit the scope of federal criminal Commerce Clause statute application, guided by two significant policy concerns. *See United States v. Bass*, 404 U.S. 336, 349 (1971). First, courts must narrowly interpret federal criminal statutes because crimes are traditionally state matters. Second, courts will narrowly interpret criminal statutes when the meaning is less than plain and clear. *See id.*

Further narrowing should occur even after Congress has passed a valid criminal law pursuant to its commerce clause powers. Even when Congress has legislated to the full extent of its commerce power, it has recognized that the federal executive should impose criminal sanctions only to the extent that misconduct obstructs a specific federal function. When misconduct does not concern federal issues, punishment should be left to State and local governments. *See* SENATE COMM. ON THE JUDICIARY, CRIMINAL CODE REFORM ACT OF 1977, S. Rep. No. 95-605, 95th Cong., 1st Sess. 29 (1977).

The Framers did not contemplate that the executive branch would have unlimited power to enforce, in its sole discretion, congressional acts beyond all constitutional confines. To the contrary, the executive's discretion in enforcing federal law must reflect the founder's careful efforts to "check whatever propensity

a particular Congress may have to enact oppressive, improvident, or ill-considered measures." *INS v. Chadha,* 462 U.S. 919, 947-48 (1973).

> [The Executive] establishes a salutary check upon the legislative body, calculated to guard the community against the effects of faction, precipitancy, or of any impulse unfriendly to the public good which may happen to influence a majority of that body.....The primary inducement to conferring the power in question upon the Executive is to enable him to defend himself; the secondary one is to increase the chances in favor of the community against the passing of bad laws through haste, inadvertence, or design.

Id. at 948 (quoting The Federalist Papers, No. 73). In this case, the executive did not act as a "salutory check," rather, it ignored the dictates and checks of federalism inherent in the limitations of federal power.

II

IN PROSECUTING CASES IN WHICH CONGRESS HAS DETERMINED THAT THE AFFECT ON INTERSTATE COMMERCE IS AN ELEMENT OF THE OFFENSE, THE GOVERNMENT MUST PROVE THAT SUCH EFFECT OF THE CHARGED ACT WAS "SUBSTANTIAL."

Given the executive's inability, or unwillingness, to adhere to the limits inherent in our federal system, the judiciary must act to ensure that constitutional limits are enforced. The power of Congress over interstate commerce is broad and is not confined to the regulation of specific acts of interstate commerce. *See*

United States v. Darby, 312 U.S. 100, 118 (1941). It extends to those intrastate activities which have an identifiable effect on interstate commerce, so long as those acts "substantially affect" interstate commerce. *See Lopez*, 514 U.S. at 558-59.

Congress can exercise this limited regulatory power through two distinct legislative tools: general findings and specific elements. When Congress relies on general findings to regulate conduct under the commerce clause, it may regulate behavior regardless of the case-by-case effect on interstate commerce. In specific element cases, Congress requires proof of impact upon interstate commerce as an element of the regulation; in effect requiring that each prohibited activity have a case-by-case effect on interstate commerce. This Court has noted the distinction between "findings" statutes and "elements" statutes.

> Congress has sometimes left it to the courts to determine whether the intrastate activities have the prohibited effect on the commerce.... It has sometimes left it to an administrative board or agency to determine whether the activities sought to be regulated or prohibited have such effect.... And sometimes Congress itself has said that a particular activity affects the commerce....

Darby, 312 U.S. at 120.

The lower federal courts must not be allowed to conflate the analysis appropriate to "findings" cases with that necessary in "element" cases. In the first category -- findings cases -- Congress specifically sets out on its own to determine the purpose and scope of the enacted statute. In such cases, it is appropriate for

the courts to give great deference to the legislative branch when reviewing the constitutional scope of the act under the Commerce Clause. In contrast, in the latter category -- elements cases -- Congress enacts a statute which specifically leaves the determination of the constitutional limit of the act's application to the jury and the courts that review the jury's verdict. The instant case is an elements case which requires the application of a strict "substantial effects" test to the specific acts alleged as a violation of a federal sovereign interest.

A. Aggregation Analysis Is Approved for General Findings Cases.

This Court, in both the civil and the criminal regulatory context, has approved the concept of "aggregation" for findings cases. *See Wickard v. Filburn,* 317 U.S. 111, 127-28 (1942). The aggregation doctrine allows federal regulation of purely local acts if those acts, when viewed on a national scale, substantially affect interstate commerce. In *Wickard,* a findings case, this Court held that the commerce clause allowed the federal government to prohibit a farmer from harvesting wheat solely for his own consumption as part of its regulatory power over wheat production. This Court concluded that the federal commerce power included this prohibition even though the specific act was not regarded as commerce. *See id.* at 125. In reaching this conclusion, the Court focused on the conduct of not just one farmer, but of all the other farmers subject to the regulation.

Although one farmer growing wheat for himself may have a trivial effect on the wheat market, his conduct was "far from trivial" when "taken together with that of many others similarly situated." *Id.* at 128. Thus, even if an individual's activities do not significantly affect interstate commerce, they may be regulated if Congress finds that they are part of a class of activity that does.

This doctrine of aggregation is utilized in cases in which Congress seeks to regulate an interstate market or which involve a related regulatory scheme. *See Maryland v. Wirtz,* 392 U.S. 183, 196 n. 27 (1968) (stating "where a general regulatory statute bears a substantial relation to commerce, the de minimis character of individual instances arising under the statute is of no consequence"). In *Heart of Atlanta Motel, Inc. v. United States,* 379 U.S. 241 (1964), this Court employed the "class of activities" test, to sustain an act of congress requiring hotels or motels to accommodate minority guests. *See id.* at 247. The Civil Rights Act of 1964 declared that "any inn, hotel, motel, or other establishment which provides lodging to transient guests" affects commerce per se. Likewise, in *Katzenbach v. McClung,* 379 U.S. 294 (1964), this Court adhered to the aggregation principle and stated: "[W]here we find that the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end." *Id.* at 303-04.

This aggregation analysis employed by the Court in the civil

"findings" context, has been cautiously extended to the criminal "findings" context. For example, in *Perez v. United States,* 402 U.S. 146 (1971), a "findings" case, this Court held Title II of the Consumer Credit Protection Act is within Congress' Commerce Clause power to control activities that affect interstate commerce. Further, this Court held that Congress' findings were adequate to support its conclusion that loan sharks who use extortion to collect payments for loans belong in a class largely controlled by organized crime. The loan shark racket, Congress therefore concluded, had a substantially adverse effect on interstate commerce. *See id.* at 156-57.[8]

In *Huddleston v. United States,* 415 U.S. 814 (1974), a findings case involving illegal firearm dealing prescribed by the Gun Control Act, this Court held that no interstate commerce nexus need be demonstrated at trial. *See id.* at 832. This Court

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[8] However, what Justice Stewart said as a caution in dissent in *Perez* with regards to loan sharking can be equally applied to arson:

> [I]t is not enough to say that [arson] is a national problem, for all crime is a national problem. It is not enough to say that some [arson] has interstate characteristics, for any crime may have an interstate setting. And the circumstance that [arson] has an adverse impact on interstate business is not a distinguishing attribute, for interstate business suffers from almost all criminal activity, be it shoplifting or violence in the streets.

Perez, 402 U.S. at 157-58.

concluded that Congress intended, and properly so, that 18 U.S.C. §§ 922(a)(6) and (d)(1), were to reach transactions that are wholly intrastate, on the theory that such transactions affect interstate commerce. *See Id.* Conversely, in the case at bar, an element case, § 844(i) requires proof of a nexus between the alleged criminal activity and interstate commerce.

Although the Court has in the past relied upon the aggregation doctrine to find Congress acted within its powers in a findings context, in *Lopez*, a majority of this Court identified the existence of limits even under an aggregation analysis. In invalidating a law barring gun possession near schools, the Court found that it

> is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated. It cannot, therefore, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce.

Lopez, 514 U.S. at 561. This Court held that if the government's arguments regarding aggregation prevailed, there would exist no perceived limitation on federal power, even in areas such as criminal law enforcement or education where States historically are sovereign. "Thus, if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate." *Lopez,* 514 U.S. at 564. Therefore, this Court concluded, consistent

with the great weight of history, tradition and the proper balance of powers, that the proper test requires an analysis of whether the regulated activity "substantially affects" interstate commerce. *See id.*

B. This Court Has Never Approved Aggregation Analysis in Elements Cases.

In statutes in which a jurisdictional element is explicitly required, this Court has never applied the aggregation principle. *See, e.g., Allied-Bruce Terminix Companies, Inc., v. Dobson,* 513 U.S. 265 (1995) (reading the Act's language as insisting that the transaction in fact involve interstate commerce); *U.S. Bulk Carriers, Inc., v. Arguelles,* 400 U.S. 351 (1971) (holding that the section of Labor Management Relations Act providing a federal remedy in an industry affecting commerce does not abrogate statutory remedy); *Evans v. United States,* 504 U.S. 255 (1992) (holding that, in a Hobbs Act element case, receipt of payment was an element of extortion charge);[9] *Gulf Oil Corporation v.*

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[9] The Hobbs Act, 18 U.S.C. § 1951, has been subject to recent aggregation based challenges. *See, e.g., United States v. Hickman,* 179 F. 3d 230 (5th Cir.) (en banc), *petitions for cert. filed,* Nos. 99-464, 99-5614, 99-6258, 99-6302, 99-6378 (1999). Although this Court need not reach the effects of its decision on the Hobbs Act, Amici believe that the Commerce Clause requires any effect on interstate commerce in a "elements" case to be "substantial" in order to invoke federal jurisdiction. This is true even though the jurisdictional

(continued...)

Copp Paving Company, Inc., 419 U.S. 186 (1974) (declining to extend the Robinson-Patman Act to reach a multitude of local activities); *Caron v. United States,* 524 U.S. 308 (1998) (holding Massachusetts law that permitted convicted felon whose civil rights have been restored to possess rifles trumped federal statute regarding punishment); *Sedima, S.P.R.L., v. Imrex Company, Inc.,* 473 U.S. 479 (1985) (no aggregation analysis applied in case of civil remedies for criminal conduct); *AFL-CIO v. Local 334,* 452 U.S. 615 (1981) (holding that a union contract satisfies the commerce element for under the Taft-Hartley Act); *Scarborough v. United States,* 431 U.S. 563 (1977) (holding that proof was required that a firearm previously traveled in interstate commerce to satisfy the required nexus between possession and commerce); *United States v. Culbert,* 435 U.S. 371 (1978) (holding Congress intended to make criminal all conduct within the reach of the

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[9](...continued)
elements of the arson statute and the Hobbs Act can be distinguished. The arson statute at issue in this case requires that the property involved be "used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce." Section 844 (i) of 18 U.S.C. The Hobbs Act, on the other hand, prohibits extortion which "in any way or degree . . . affects [interstate] commerce." 18 U.S.C. § 1951(a). The language of the latter statute seems to imply a lower level of the connection to interstate commerce. However, Amici believe that, in light of *Lopez*, wherever the term "affect" is used in a jurisdictional element, that term implies the qualifier "substantial" in order to meet constitutional muster.

statutory language, and did not intend to limit the statute's scope by reference to an undefined category of conduct termed "racketeering").

Legitimate challenges in jurisdictional element statute cases address the proper scope of the statutes rather than the limits on congressional authority. Specifically, the scope of the Commerce Clause, when employed to establish federal criminal jurisdiction is the proper focus for this Court . In order to satisfy the Congressionally mandated burden of proof on the jurisdictional element, the government must establish at trial a specific nexus between a particular crime and a substantial effect on interstate commerce for each charge. Indeed, to allow the same aggregation analysis in an elements case as allowed in a findings case would create just the unreviewable general police power so feared by the federalists and the representatives of the States at the time of the framing. This Court's decision in the instant case should stand to clarify this point.

C. The Lower Courts Have Misapplied Aggregation Analysis in Elements Cases.

There is currently a mixed application of aggregation in "elements" statutes among various courts below, including the Circuit Courts of Appeals. Some courts have found aggregation-type arguments irrelevant to § 844(i) prosecutions; instead they have required proof of a "substantial" effect on interstate commerce in each federal arson case. *See, e.g., United States v.*

Pappadopolous, 64 F.3d 522, 527(9th Cir. 1995) (holding that the government must satisfy the jurisdictional requirement by pointing to a substantial effect on or connection to interstate commerce); *United States v. Denalli,* 73 F.3d 328, 330 (11th Cir. 1996) (holding that destruction of victims' private residence by fire did not have a sufficiently substantial effect on interstate commerce to support conviction under federal arson statute).[10]

The Seventh Circuit Court of Appeals, in the instant case, has followed the lead of other circuits and has introduced and applied aggregation analysis where it has no place -- in this elements case. The court below recognized that application of § 844(i) can only be justified, if at all, only as a regulation of an activity that "substantially affects" interstate commerce. *See United States v. Jones,* 178 F. 3d. 479, 480 (7th Cir. 1999). Specifically, the court noted that "these interstate connections are pretty slight for a single building; they don't establish a 'substantial' connection between this arson (or this residence) and interstate commerce." *Id.* The court concluded, however, that it was appropriate to apply an aggregation analysis to this elements case and,

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[10] These courts take literally *Lopez's* statement that the effect on commerce must be a "substantial" one. The Ninth Circuit in *United States v. Gomez,* 87 F.3d 1093, 1095 (9th Cir. 1996), decided after *Pappadopolous,* held that intrastate economic or commercial activities must substantially affect interstate commerce in the aggregate to be regulated, while non-economic or non-commercial activities must individually have a substantial effect on interstate commerce.

therefore, a local arson's "collective effect" on interstate commerce is substantial. *See id.* The lower court disregarded as constitutionally meaningless the local arson's trivial connection with interstate commerce. To the contrary, it reasoned that the combined effect of all acts of arson against residential property committed in this country have sufficient effect on the interstate natural gas and the insurance industries to qualify as "substantial." The application of this analysis is misplaced as the result would be that any time Congress required a jurisdictional element, the executive (and the courts) would be left free to read the element wholly out of the statute. *See, e.g., United States v. McGuire*,178 F.3d. 203, 212 (3rd Cir. 1999) (stating "[w]e do not believe that the Supreme Court required Congress to include a jurisdictional element under *Lopez* only to have courts interpret the resulting statutes in such a way as to remove it").

This Court in *Lopez* rejected reasoning simlar to the Seventh Circuit's in this case. In *Lopez*, the government argued that possession of a firearm in a school zone substantially affects interstate commerce because it may result in violent crime, which in turn affects the national government and interstate commerce. In support of their argument, the government specifically cited the insurance costs of violent crime. *See Lopez,* 514 U.S. at 564. This Court refused to credit such contentions, reasoning that under such a theory "it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or

education where states historically are sovereign." *Id.* This Court recognized that relying solely on the aggregated costs of crime, to uphold the application of a federal criminal statute under the Commerce Clause would "convert congressional authority under the commerce clause to a general police power of the sort retained by States." *Id.* at 567.

The arson crime at issue in this case has no discernible and definable connection with an interstate market or other interstate commercial process and therefore the limiting aspect of the jurisdictional element has not been met. The analysis of the court below, upholding the conviction, essentially nullifies the limiting role of the jurisdictional element in the statute. Contrary to the lower court's holding, the limited nature of the commerce power requires proof of a "substantial" connection between interstate commerce and any activity that Congress endeavors to make into a federal crime.

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CONCLUSION

Amici Curiae therefore urges this Court to reverse the Seventh Circuit Court of Appeals in order to adequately limit the power of the executive *vis a vis* the Commerce Clause of the United States Constitution. Such a holding would complete the work begun by this Court in *Lopez* and would serve to re-balance the power enjoyed by the States and the federal government.

Respectfully submitted,

National Association of Criminal Defense Lawyers
Association of Federal Defenders

Of Counsel:

BARBARA BERGMAN
University of New Mexico
School of Law
1117 Stanford, NE
Albuquerque, NM 87131
505/277-3304

*JEFFREY J. POKORAK,
Acting Director,
Clinical Programs
St. Mary's University,
School of Law
2507 N.W. 36th Street
San Antonio, TX 78228
210/431-5729
**Counsel For Amici Curiae*
Member, Supreme Court Bar

ERNEST ALDERETE, RACHEL LINDSAY and VELIA MEZA,
Student Attorneys
Criminal Justice Clinic
St. Mary's University
School of Law
2507 N.W. 36th Street
San Antonio, TX 78228